

98317

Bind this cover in front

Supreme Court,

CHENANGO COUNTY.

ANNA N. DWIGHT and others, Executors, &c., of
WALTON DWIGHT, deceased, Respondents,

against

THE GERMANIA LIFE INSURANCE COMPANY,
Appellant.

APPELLANT'S POINTS AND ARGUMENT.

SHIPMAN, BARLOW & LAROCQUE,

Attorneys for Appellant,

35 WILLIAM STREET, NEW YORK CITY.

G. L. SESSIONS,

Attorney for Respondents,

BINGHAMTON, NEW YORK.

OGDENSBURG, N. Y.

REPUBLICAN & JOURNAL COMPANY, PRINTERS.

1884.

IN THE
SUPREME COURT

OF THE STATE OF NEW YORK.

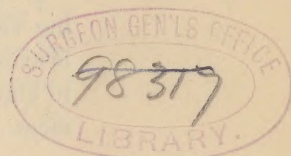
SUPREME COURT—CHENANGO COUNTY.

ANNA N. DWIGHT and others, Executors,
&c., of WALTON DWIGHT, deceased, *Re-*
spondents,

ag't

THE GERMANIA LIFE INSURANCE CO.,

Appellant.



APPELLANT'S POINTS.

STATEMENT OF CASE.

Walton Dwight died November 15th, 1878, by natural death as the plaintiffs allege—by suicide as the defendants claim to have shown.

During the six weeks before the 9th day of September, 1878, Dwight applied to thirty-two different insurance companies (*fol.* 2067), for insurances upon his life, aggregating \$390,000 (*fol.* 2067). He obtained \$250,000 from twenty-one of the companies applied to (*fol.* 2117).

A long time before these applications were made he had obtained paid up policies for about \$6,000 in favor of his wife.

Dwight in all but two of the policies issued upon his applications for \$390,000 of insurances (and in these two he applied for a correction of policies), arranged that the premiums should be payable quarterly. The policies were of course therefore delivered on the payment of the first quarterly instalment.

A very few days before the *next* quarterly payment became due on the first maturing policies (the first one became due on the 19th day of November, 1878, fol. 1465), Walton Dwight, after a short alleged illness, suddenly died, with indisputable evidences of suicide, as the appellant claims.

At the time of applying for and obtaining such insurances, which involved the payment of over \$8,600 annually (fol. 2068), Walton Dwight was an admitted bankrupt (fol. 2065), with his application pending at the time of his death to be discharged from his debts (fol. 2064).

Dwight, while in the act of applying for and obtaining these large insurances upon his life executed a will bearing date in September, 1878, but the date of the day in blank. In its 25th section occurs the following statement (fol. 2633):

"My estate is made up most entirely of life insurance, which amount I do not propose to ever materially lessen. I have lived to that age and been subject to such experience that I have no further ambition for myself beyond leaving my family comfortable and with sufficient means to enable them to live as they were in the habit of heretofore, and also in making such friendly bequests to those who are endeared to me from association and kindly acts as will leave pleasant memories behind me when I start on the long journey."

After making bequests therein amounting to \$68,900 to sundry individuals, doctors, lawyers and ministers, mostly all residing in Binghamton (where the testator died), and to public institutions, churches, firemen, the

poor and the press of Binghamton, he leaves the balance of \$187,000 to his wife and only child.

The style in which he and his family had lived was at the cost of \$18,000 a year (*fol.* 413).

Dwight left no assets whatever except life insurance policies.

One of the policies obtained by Dwight, at the time he was negotiating these large insurances, is the one in suit, issued by the Germania Life Insurance Company. It is dated August 28th, 1878. It became operative by delivery and the payment of the premium on the 4th day of September, 1878 (*fol.* 2248). It purports to insure Dwight's life for the benefit of his personal representatives and assigns to the amount of \$15,000, and the first quarter of the annual premium acknowledged therein to be paid is \$131.55.

It was one of the conditions of the policy that "it should be void if any representations made in the application therefor, *upon the faith of which the contract was made*, are in any respect found to be untrue" (*fol.* 20).

The Germania Life Insurance Company have refused to recognize any liability thereon. They claim that the same was obtained by Dwight with a *fraudulent object*—not only by means of false statements and warranties as to his *health*, his business and the *amount of other insurances* upon his life, and in other respects, but with the *preconceived fraudulent intention* to be helped along by the other fraudulent acts, *to cheat the Company* by suicidal death. They also allege as an independent defence that Dwight died by suicide.

The action came on to be tried at a circuit court held at Norwich, Chenango County, November 12th, 1883, before Justice Follett. The trial lasted until December 13th following, when the jury after a confinement of 48

hours, finally returned a verdict for the plaintiff for \$18,743.27.

From the judgment entered on that verdict the defendant has appealed. The appellant claims not only errors of the court below in the admission and rejection of testimony—in its refusal to non-suit the plaintiff—in its charge to and refusal to charge the jury—but it insists that the uncontradicted and unexplained acts of Walton Dwight prove that when he obtained the policy in question he had a fraudulent and corrupt purpose to cheat the appellant, and that the fraudulent purpose was finally consummated by a suicidal death.

It also claims that even though the original purpose of Walton Dwight was not fraudulent, and even though he did not have the intention to, and did not commit suicide, that material facts alleged in the application for the policy in question were untrue and that such statements being made warranties by the policy vitiated and avoided that instrument.

By its answer served in the action, it offered on the return and cancellation of its policy, to return to the plaintiff the amount paid by Walton Dwight on the first quarter's premium thereon (*folio 57*).

I.

The law allows nothing to be gained by fraud.

We would not discuss this proposition except for the reason that Walton Dwight seemed to have thought that possession once obtained of a policy, no matter if by a lie, (see post, also folios 549, 550, 869, 870, exhibits 48, 49, 93, 94, 95, 96, 97, folios 528, 529, 530, 199, 230, 2235, exhibits 52, 53, 54, 83, folios 868, 870 as to policies from United States Life Insurance Co., Union Mutual, Washington, New England Life Insurance Co., Metropolitan Insurance Co., Mutual Benefit,) his claim thereunder was a valid one. We discuss it also because the Court below, in the charge of the judge and the verdict of the jury, seemed to think that misrepresentations even in matters which the policy made material to the risk were of no account if the jury saw fit to disregard them.

The proposition is a truism. Text writers and Courts sometimes carelessly say "fraud vitiates all contracts." *There never can be a contract* in favor of a party that has been guilty of any fraudulent *design* or of any fraudulent *acts* in inducing it. Fraud *undoes* the stipulations of the party defrauded as fast as the latter innocently puts the bargain into *form*. In form there may seem to be a contract. *In substance there is none*. There is only the *spectre* of a contract without reality.

In *Kimball vs. Aetna Insurance Co.*, 9 Allen, 540, which was a case of fraudulent representation by a policy holder, the Court says:

"In making the representation the utmost good faith is required. If an existing fact material to the risk is misrepresented by the owner to the underwriter *the minds of the parties never met*. They agree on no subject matter to which the contract can attach. The contract *founded on such misrepresentation never takes effect*. The underwriter may treat it as a nullity."

Again, "If representations, whether oral or written concerning facts existing when the policy is signed are false, *it never had any existence as a contract*," &c., &c.

Again, "If the facts are thus substantially different from the representations, the whole foundation of the contract fails. The risk does not attach. *The policy never becomes a contract between the parties*."

Again, in speaking of representations of facts, "They are its foundation, and if the foundation does not exist, the superstructure does not arise. Falsehood in such representations is not shown to vary or add to the contract which has once been made, *but to show that no contract ever existed*."

Again, "Falsehood in the affirmation prevents *the contract from ever having life*."

II.

If Walton Dwight, when he obtained the policy in suit, designed ultimately to cheat the appellants by a suicidal, or pretended death,

such design avoided the policy and there was no contract of insurance.

The original purpose ultimately to cheat, *although not carried into execution* by action, is equally potent with false affirmations and fraudulent acts, *in undoing instantly* all that the wrong doer claims to have been done in his favor.

A vendor is allowed to retake his goods if the vendee has been guilty of a *preconceived fraudulent intention* not to pay for them. The vendor need not wait for the day of credit to expire in order to test whether the vendee means to put his fraudulent purpose into execution. He can proceed instantly to obtain possession or to prosecute for the fraud. The law treats the sale and delivery as a nullity.

In *Devoe vs. Brandt*, 53 *New York Rep.*, 463, 464, 465, the Court of Appeals say: "Here was abundant evidence for their consideration that this purchase was made with a view of cheating the plaintiff and that he never intended to pay for the goods," &c., &c.

Again—"There is good ground for inferring from the facts proved that he intended to commit a fraud in the purchase and he deliberately proceeded to its consummation. Such a fraud may be as easily consummated by a suppression of the truth as by the suggestion of a falsehood. The law is guilty of no such absurdity as to require a false affirmation as the only basis on which to prove a fraud among merchants. The fact to be proved is that the purchase was made with intent to defraud."

Again—"We may assume, then, that the goods were fraudulently purchased. No title then

"*passed* and the vendor can retake them from any "one but a bona fide purchaser."

See also *Hencquin vs. Naylor*, 24 N. Y. Rep. 139.

Nichols against Michael, 23 N. Y. Rep., 265.

Peter vs. Wieting, 49 Barbour, 315.

So in this case. If Walton Dwight obtained the policy in suit with the *fraudulent purpose* of killing himself or of pretending death and the substitution of a corpse, he was guilty of a fraud which *avoided his policy*—leaving only *the form* of an insurance upon his life *but none existing in fact*. An action might have been brought for the delivery and cancellation of the worthless instrument.

Bliss on insurance, sec. 426, says: "A bill may "be filed to have a void policy delivered up to be "cancelled, whether it is void in consequence of "fraud in the procurement of the policy or has "become so by reason of the violation of some of "its conditions."

The act consummating the original wrongful purpose was as wholly unnecessary to complete the fraud as was the expiration of the day of credit with non-payment of the debt to the vendor in the cases cited. The act carrying out the wrongful purpose is only important as matter of evidence to give the seal and assurance of the purpose. If there is evidence of the latter aliunde, the proof of the fraud is complete without it.

A distinction must be kept in mind between an action like this to enforce an instrument alleged to have been obtained for a fraudulent purpose, and an action by a defrauded party *for damages*, where *there has been no damniifying act*—where the fraud rested only in intent, *without action*. In

the latter case it has been correctly held that there exists no cause of action because every thing remained in a dormant vicious intent without damage. In the present case the policy of insurance sought to be enforced, as we claim, was the offspring of fraud—was induced to further Dwight's scheme to cheat—was an act of the Germania Insurance Company which never would have been done had it known of Walton Dwight's wrongful design ultimately to cheat. And this being so there never was in law a policy of insurance.

The utter voidness of the instrument in question made it impossible to be enforced, even if Dwight had died a natural death or had become penitent after receiving it. Neither of these two acts shrived the original fraud—and more than all, neither could put life into an instrument which never had vitality.

So too it can be said that if Walton Dwight obtained the policy in question with no determined choice of means at the time of its issue, whereby the cheat should be accomplished—whether by suicide or pretended death—the fraud was complete if the design to cheat existed. The choice of means could be (as it was perhaps in this case), determined later. It was the preconceived *intent to cheat*—no matter *how* it was to be carried out—that rendered nugatory the act of issuing the policy.

The Judge on the trial below wholly ignored the principle contended for in our point. At folio 2053 he charged the jury thus: "If the other fact that is alleged "by the defense is found to be true, that the policy was "procured with intent to defraud the company, and " *that was consummated by the voluntary death of Walton*

"*Dwight*, in that case the plaintiff cannot recover." This was expressly excepted to at folio 2182.

Again, he charges, at folio 2161, "I am asked also to charge that even though you find that Walton Dwight originally procured this particular policy, with intent to defraud the defendants, that unless that intent was consummated by suicide, the plaintiffs are entitled to recover. Whatever I might have thought upon that question (*had the issue been different*), after an examination of the answer in this case, I say, upon this question, which is the sixth, that the defendants are not entitled to a verdict on this ground unless you find *that the fraud was consummated by the willing death of Walton Dwight by self murder—by suicide.*" The Court here avoids a direct decision of the question whether the fraudulent design was sufficient to destroy the policy, and holds that the defendant's answer precluded such defense unless the fraudulent design was put into execution.

The Court erred. The answer, as a *third* and *separate* defense, sets up the willful suicide of Dwight designedly, and not while mentally deranged. This defense of suicide involved an intent to take his life, but not necessarily, *before* the issuing of policy. The policy might have been obtained with an honest purpose, and therefore valid when issued. The pleader, then, to raise the question of a *preconceived* fraudulent design ultimately to cheat—entertained by Dwight *before* the issue of policy (*fol. 49*)—as a fourth defense, sets up two separate facts, *either one of which was a defense*. It says: "For a fourth *separate* and *distinct* defense, the said defendants, further answering the said complaint, allege, on information and belief, that said Wal-

"ton Dwight, with the *preconceived intent to cheat and defraud* these defendants by thereafter taking his own life, and thus defrauding the defendants of the amount of said policy, *procured the said policy of insurance.*" Here the *original preconceived intent* is plainly and fully charged. The pleader then goes on to state an *additional fact wholly redundant and unnecessary* (because the suicide had been already set up as a separate defense)—"and thereafter did take or procure the taking of his own life with the said preconceived design and intent thereby to cheat and defraud these defendants," &c., &c.

The plaintiff is not injured. He has not been taken by surprise. The pleading states *all the necessary facts* to make up the defense of *preconceived intent to defraud*. He has not been prejudiced if perchance the pleader was mistaken as to the law in drawing the answer, and put in more facts than were necessary to make it conform to his idea of the law. *Insufficiency* of statement of facts in a pleading may prejudice the opposite party by surprising him of a defense he did not expect, and therefore amendment may be refused; but redundancy of statement never can prejudice. It may offend good taste in pleading—no more; and the courts are open to correct it. The plaintiff has not sought that remedy, and should be debarred now from complaint.

If amendment was necessary by striking out the redundancy, the Court should have ordered it. The statute of amendments is ample to reach the case. It was a merely technical defect, which worked no harm to the plaintiff. "Furtherance of justice" demanded the amendment, if necessary. The opportunity should not have been seized to serve the furtherance of fraud.

But "in actions for fraud it is not necessary for parties to prove all of the allegations of a complaint as to the means used by the wrongdoer in doing the act complained of, or the manner of carrying it out, provided less than all are sufficient to constitute a cause of action, and what are sufficient are proved."

Bigelow on Frauds, page 493.

But it may be said that notwithstanding the earnest and effective use that has been made of this technical objection to the answer in the charge to the jury, it has not harmed the defendant. It may be said that the jury by their answer to the 6th question have found that the policy in suit was not obtained by Walton Dwight with the preconceived design and intent to defraud the defendant. So they have. Notwithstanding the Court told them expressly that the *preconceived design to cheat was no defence* unless the intent was executed by suicide—refused to look at the 6th question disconnected from the 7th, which embodied the suicide—grouping them together as one (*fol. 2116*) and charging that an affirmative answer to the 6th depended on an affirmative answer to the 7th—after failing to call the attention of the jury to one single fact of the ample and uncontradicted evidence that Dwight meant to cheat the Insurance Companies from the very start of his raid upon them to the end of his miserable life—he still leaves the 6th question to the jury to be answered separately. Is it at all strange that with such action and charge of the Judge, the Jury should consider the sixth question as entirely immaterial, and that, worn out with long confinement, they should "compromise on their views"? (*Fol. 2195.*)

Could any careful, conscientious finding upon such 6th question be expected from the jury under this charge? Was their answer given for anything else than *mere form*, after having been expressly told by the Court that even finding for the defendant on the question could not influence them as to the general verdict to be rendered?

To the holdings of the Judge that a fraudulent intent of Dwight in obtaining the policy in suit was not of itself a defense under the pleadings, unless coupled with proof of suicide—to his charges to the jury involving the same error—exceptions were duly entered. (See folios 2197, 2200, 2214, 2217.)

III.

If Walton Dwight made any false and fraudulent representations to the appellant in the application for the insurance upon his life, even though his death was not connected with the fact misrepresented, the contract of insurance was void.

The contract of life insurance is in practice entered into in consequence of a written application made to the company. In this application or subsequent to it, the insurer requires certain information, and it is in reliance upon the correctness of this information that the company enters into the contract. The company can ordinarily have no knowledge of many of the facts

which it is essential that it should know before it can determine whether it would be prudent to take the risk at all, or before it can decide what premium equitably represents the risk taken. Some of these facts can be known only to the insured. In this respect the life insurer is more at the mercy of the insured than is the fire underwriter. (See *Bliss on Insurance*, sec. 33.)

"If in such application a fact is *specifically inquired about*, the insurer shows that *he regards it as material* and a misrepresentation about it "avoids the contract, though it *may not in reality be material*."

(See *Bliss on Insurance*, sec. 42. *Phillips on Insurance*, sec. 542. *May on Insurance*, sec. 196.)

The authorities quoted avoid the contract for simple misrepresentations as to the fact inquired for—which may not have been misrepresented fraudulently.

"If the *misrepresentation is fraudulent* it will "avoid the contract even when it relates to a "matter not material to the risk—that is to say "if the misrepresentation is made *with intent to deceive* or is shown *to have been false within the knowledge* of the assured, it makes no difference "if it is to a material circumstance or not. In "such a case all inquiry into its materiality is "precluded."

See *Bliss on Insurance*, sec. 40.

"The death need not arise from a cause connected with the facts misrepresented."

Bliss on Insurance, sec. 40.

Arnold on Insurance, sec. 189-190.

In the case of *Valton vs. Nat. Fund Life Ass. Co.*, 20 *N. Y. Reports*, 32, the Court of Appeals hold that a representation *which was not made in the*

application—which was false—and which although not material to the risk was so *in the judgment of the insurer*, avoided the policy.

We will not spend time in the notation of authorities upon this point. The cases are agreed that specific inquiries make the answers material although they may not seem so on their face, and that willful falsehood in every case (we might say falsehood alone) avoids the policy. A fortiori, if the representations are also *upon their face* material to the risk, to decide upon its acceptance or rejection, or as to the premium to be charged, and they are false, the like rule of law prevails. If they are false to the knowledge of the insured they become thereby fraudulent, and the plain principle governing all cases of fraud applies—that the wrongdoer shall gain nothing by his wrong.

IV.

Walton Dwight obtained the policy in suit with the fraudulent purpose ultimately to cheat the appellant, either by suicide or by a pretended death.

The policy in suit, for \$15,000, was applied for August 18th, 1878 (see page 788 of case)—was issued August 28th, 1878 (see page 6)—was delivered and the premium paid Sept. 4th, 1878 (*fol.* 2248). It was one of 32 policies aggregating \$250,000 which Walton Dwight obtained on his life from 21 companies (*fol.* 2067) between the 19th day of August, 1878, and the 9th day of

September following. We say the 19th day of August because, although two policies of Mutual Benefit Ins. Co. bear an earlier date (Aug. 1st), they were not delivered until the 6th day of September. (*Fol.* 650.) At pages 220, 221, 222, 223 will be found a list of the policies, and the respective dates of issue from the home office.

The total applications for insurance aggregated \$390,000 (*fol.* 2067), showing Dwight's design to obtain that amount if he could. All the applications were made between the 31st July and the 9th day of September following; and all but three (to the N. Y. Mut. Life, to Conn. Mutual, and to Union Mutual) between August 15th and said 9th day of September. (See applications, pages 782, et seq.)

The business, therefore, of procuring this immense amount of life insurances was hurriedly crowded into the short space of about three weeks, making the premiums on the policies as they fell due all payable about nearly the same time. Dwight, if he intended the fraud charged, would naturally try to get all of his insurances as quickly as possible, so as to pay but a single premium upon each before the claim of loss.

Frauds in obtaining policies.

In every one of these applications Dwight was guilty of willful lying as to his previous business or occupation (see Point V., sub-points A and B)—as to prior insurances upon his life (see Point V., sub-point C)—as to his not having made other applications for insurance (see Point V., sub-point D)—as to his past and present health (see Point V., sub-points E and G). Two companies—the New York Mutual Life and Connecticut Mutual—recalled their policies before delivery for this rea-

son. (*Fols.* 199, 230, 258, 282.) Six others—the United States, Union Mutual, Mutual Benefit, New England Mutual, Washington, and Metropolitan—demanded back their policies for the same cause, at the same time tendering premiums received; but Dwight refused to deliver. (See *folios* 528, 2488, 549, 550, 869, 870, and pages 880, 881, 882, 883, 884.)

Dwight obtained the policy of the Union Mutual by a fraudulent collusion with N. W. Batchelder, the agent who applied for same. The policy, while yet in the hands of the agent, was recalled by telegram. (*Fols.* 640, 641, 642, 643.) Dwight indited two lying telegrams in response to the General Agent and to the President of Company, that the policy had been delivered and the premiums paid (*folios.* 640, 641, 2488, 2489, 2490), and subsequently, on September 6th, 1878, got the policy delivered to himself by Batchelder. (*Fols.* 651, 652.)

To the agent of the Washington Company Dwight admitted the fraud that he was practising, and begged the agent to say nothing about it, as it would prevent him from getting insurances. (*Fols.* 551, 552.)

Premiums payable quarterly.

Dwight arranges that the premiums on these policies shall be payable quarterly (see policies), notwithstanding they cost more than annual ones. He objects to the policies of the New York Mutual Life and Connecticut Mutual because they were payable annually. (*Fols.* 247, 249, 1458, 1459). The quarterly payments will enable him to effect almost *four times* the amount of insurances with the money *that he has borrowed for*

the purpose (fols. 1451, 2651 to 2666); and if he puts his intended cheat into an act of suicide or pretended death before the second quarterly instalment is payable, he will have gained these immense insurances at about a quarter of the annual cost. Money wherewith to gain large insurances is of more moment to him than shortness of life—either his own or a substitute's.

Premiums.

The premiums payable upon the policies obtained amounted to \$8600 annually, as the Judge stated without contradiction in his charge. (*Fol.* 2068.) They are in fact a few hundred dollars in excess of this. Had the whole amount of \$390,000 applied for been gained, the premiums would have reached \$13,000 annually.

Insolvency.

Walton Dwight was at this time an admitted *beggared bankrupt* (fols. 2064, 2119, 434, 406, 407, 542, 543). His wife was also insolvent. (*Fol.* 2065.) Both had applied for their discharge from their debts. (See pages 152, 154, and *fol.* 492.) He had to borrow the money to pay the premiums on the policies. (*Fol.* 1451. See checks of McDonald and Pine, folios 2651 to 2666.) He had to borrow money to pay his board (*fol.* 407). He had no money to pay little debts of \$1, \$1.60, \$1.80, \$2, \$2.40 and upwards, and he provides for their payment *expressly, giving names of creditors*, in his will (*fol.* 2602), of which more hereafter.

Disappointments in business.

He had been disappointed in all of his business schemes. He told Secomb so. (*Fols.* 189, 190.)

He had spent large sums of borrowed money (*pgs.* 165, 166, *fol.* 495, 496, 497, 498,) in Dwightville, in Binghamton, in building the costly hotel there bearing his name, and some forty or fifty expensive dwellings. (See *fol.* 1345, 1346, 1347, 413, 414.) In March, 1877, all were sold on execution, and he was turned out of doors from the Dwight House, which he had kept as a hotel for the previous three years. He left it, as he says, with less than eight dollars in his pocket, and his wife with less than two; and he adds, mournfully, "*That is every dollar I had on the face of the earth.*" (*Fols.* 406, 407.) The man that had lived at the rate of \$18,000 a year (*fol.* 413) was reduced to the condition "*of borrowing money right along to pay his board bills.*" (*Fol.* 407.) His creditors had also forced away from him an equity in some real estate, worth about \$5000 which he had in some way tried to save from the general wreck; and he speaks of it as "sweeping the last plank from under him" (*fol.* 404); he says it made him "furious" (*fol.* 404), and "very sick." (*Fol.* 406.)

From this scene of ruin he went to Chicago, and returned again in June or July, 1878 (*fol.* 541, 542), which, it will be noted, was only a few weeks before he put into execution his life insurance project. He tells Rev. Mr. Phillips of the misfortunes that still clung to him, and that he "was left without a dollar." (*Fols.* 542, 543.)

About the 31st of August, 1878, he tells Mr. Phillips that "he looks upon life very differently from what he used to. He used to want to live, and make money; but now, he said, if his family were only provided for, he would have no desire to live." (*Fol.* 548.)

No business.

At this time, too, after his return from Chicago, Dwight had no business wherewith to earn a living. He was at his father-in-law's, in Windsor, near Binghamton, hunting and shooting. (*Fol.* 580.) He remained there until in October following. (*Fol.* 580.) His work of obtaining insurances was then, as we have seen, completed. (*Ante* pages 15, 16.) The next we hear of him is in connection with an alleged sickness, which began somewhere between the first and middle of October (*fols.* 2236, 675), and, as is claimed, continued to the day of his death, on 15th November following.

We have given thus far a true picture of Dwight, as the uncontradicted evidence in the case has drawn it, when he is engaged in obtaining these insurances.

It shows him, as we have seen, *utterly insolvent*—effecting by *fraudulent representations* immense insurances upon his life, and even trying to get \$140,000 more—paying the premiums *with borrowed money*—*contriving by quarterly payments* of premiums to get as many policies with as little money as possible—*disappointed* in all his business schemes—*without means of support*—*with no desire to live* if his family were provided for.

We might stop here, and challenge Walton Dwight's good faith, and ask if these facts accord with an honest intent.

It will not do flippantly to push aside these damning facts, and say, "Walton Dwight had an exaggerated idea of his own abilities, and "thought that he would in the future, by specula-

"tion, earn sufficient to keep up the premiums "and support his family (*fol.* 2120), and that he "cannot be judged by the same rules as other "men." (*Fol.* 2069.) The law does not judge differently of the same acts when done by different men. It has but one rule and measure for all. Differences of temperament or enthusiasm are not regarded. The argument made above for Walton Dwight's good faith could as well be urged in the defense of every miscreant that has betrayed his trust, and who has stolen and sunk the moneys of his wards in the ocean of Wall Street.

Neither will it do to excuse his acts on account of his "enthusiasm." It is the same argument, using only another word. But the undisputed evidence in the case (and it is that which points our theory of intended fraud) shows that the man's business ambitions and enthusiasms were already dead. He said so. We will see that his will (of which we shall soon speak) says so. He said he was tired of life, and all he cared for was a provision for his family as they had always lived. (See *fol.* 548, and ante, page 2.) They had lived at the rate of \$18,000 a year (*fol.* 413); and Dwight, if he had survived and supported the same style, would have had to earn the sum of over \$26,000 for family expenses and payment of premiums.

But we must proceed with our narrative.

Will.

While in the midst of negotiating for these insurances he prepares for either a real or pretended death. He makes an elaborate and carefully drawn will by which the proceeds of these insurances—*his only assets*—are to be distributed. It is dated in the month of September, but the

day of its date is in blank. (See will, pages of case, 867 to 881.)

As to Dwight's state of health at that time, see his letter to the President of the United States Life Ins. Co., dated September 11th, 1878 (exhibit 50, folio 2482), wherein he thus speaks: "Un-
"less blown up on a steamboat or smashed in a
"railroad accident, or meet with death in some
"such way, I think I bid fair to live long enough
"to give myself more trouble in meeting my pre-
"miums than you in any lung affection."

Dwight was at this time 41 years of age (*fol.* 2061), with the fair prospect of reaching the ordinary allotted three score and ten years of life. He boasts about his health. In September he said "his health was never better. He thumped on his lungs and said he had swam the Susque-
"hanna river once or twice a day, and that he
"was going to swim the river that afternoon with
"a boy on his back" (*fol.* 549).

The will was not therefore the fruit of any apprehension of death from sickness, at the time it was made, when obtaining these insurances. Speaking therein of his "estate being made up
"almost wholly of life insurance" (*fol.* 2633)—
and of having "no farther ambition for myself
"beyond leaving my family comfortable and with
"sufficient means to enable them to live as they
"were in the habit of heretofore, and also in
"making such friendly bequests to those who are
"endeared to me from association and kindly acts
"as will leave pleasant memories behind me when
"I start on the long journey" (*fol.* 2633)—with
the fact that Dwight confessed "he was not
"worth a dollar in the world" about the time
it was made (*fol.* 542, 543), and with the addi-
tional fact that there *is not a pretence of assets*

beyond life insurance policies—we have a right to say that this will of Walton Dwight was a part and parcel of his scheme—not in “apprehension of death,” as the Court expresses it (*fol.* 2123), but in *preparation for a real or pretended death*.

It bears upon its face, too, the marks that it was *to speak quickly as a will*.

Its first section reads like a letter of business a man writes *on the evening before starting on a long journey*. It provides for the payment of a large number of little debts, of \$1, \$1.60, \$1.80, \$2, \$2.40, \$4.20, up to larger amounts (*fol.* 2602); and Dwight gives *the reasons* to his executors why he wants them paid. (*Fols.* 2600, 2601.) The paper, therefore, shows that Dwight expected that the payment was to be made *by his executors*. The will of an honest, healthy man shows by its terms only the *possibility* of an early death, and its directions are expressed accordingly. The will of a cheat would be likely to show, as this one does, either the *probability* of an early death or of its intended early operation as a will.

The will also shows that Dwight expected that his policies of insurance would be contested—and that, too, on the very ground that we have been urging.

Its 25th section is an argument of Dwight attempting to show good faith in obtaining these large insurances while utterly insolvent. He claims therein that “while working and doing “business for profit I averaged upward of \$20,000 “a year—with no capital worth mentioning, to “start with, I have averaged over ten thousand “dollars for last twelve months.” (Note the utter falsehood of this by his declaration to Phillips in July, only two months before, that he had lost

everything at Chicago, and "that he was without "a dollar"—*Fols.* 542, 543.) "Judging from this, "and from the past, I apprehend no difficulty in a "return of from ten to twenty thousand dollars a "year for my work when acting strictly for gain."

Why put this in a will?

Was it intended as nothing more than Dwight's *empty—idle soliloquy*—reasoning *with himself*—attempting to *prove to himself* his ability to pay these large premiums? Men *usually* write in their wills only their *decisions* as to distributions of their estate—write their memory of family and friends by *devises* and bequests. This will does more. It *records Dwight's argument* that though utterly insolvent—without capital and without business he can pay these large premiums upon his large insurances. Dwight could not have written this without purpose. It was written in memory of his misdeeds and was meant (although a lying pretence) to *deny bad faith*. It was meant to wash the dirty dollars he was trying to bestow.

"He who excuses—accuses."

The will, too, of this bankrupt pauper, in addition to the bequests to wife and child, bequeaths about sixty-nine thousand dollars to influential individuals and public bodies of the city of Binghamton—judges (*fol.* 149), district attorneys (*fols.* 2613, 1344), lawyers, ministers, doctors (*fols.* 1376, 1377), politicians, the poor (*fol.* 2618), the press (*fol.* 2622), public library (*fol.* 2621), the fire department (*fol.* 2623), and the like. All these are beneficiaries of this man's anticipated gains; and each and every one, therefore, from self-interest would champion his character from charges of fraud. If Dwight cheated the insur-

ance companies, then the fund from which these bequests were payable would fail.

Sickness.

It is unnecessary to sustain our point that we should show that Dwight consummated his unlawful design to cheat by a self inflicted death, and it is sufficient if we prove the intent (see ante Point II), with which he procured the policy from us. We have said heretofore that neither a natural death nor even penitence would shrive the fraud that induced the act of the party injured. Fraudulent intent and good works never mix and form a new compound from which the fraud disappears. Each keeps apart and each is to be judged by itself—and if penitence could not pardon the sin, surely a natural death in sin would not be more effective.

We prefer, however, to follow Dwight in all his footsteps down to his very death bed. We shall see that the facts—the true facts—attending this sickness are in entire unison with his preceding fraud; and when we subsequently come to discuss under another point the cause of his death, other and new facts will come forward and confirm what we have claimed.

In the early part of October, immediately following the completion of his insurance work (Dr. Burr says about six weeks before his death—*fol.* 2236—which would make it the 1st of October; others speak of it as about the middle—*fol.* 675), it is claimed that Dwight was taken sick, with malarial fever and chills.

Dr. Orton, who had been his physician for 10 or 12 years, and lived in the same city (*fols.* 1806, 1820), and to whom Dwight referred as his usual

medical attendant, in a number of applications for insurance (see folios 2359, 2366, 2376, 2383, 2385, 2390, 2393), is not called to attend him. Dr. Orton had examined Dwight on the application for policy in suit (see page 788), and on most, if not all, of the others. If Dwight meant to cheat the insurance companies he would have done just as he did do. He naturally would call in some other doctor than Dr. Orton. The latter, as the medical representative of the insurance companies, might discover and feel obliged to report any pretended sickness or tampering of Dwight with his life with drugs. Dr. Burr is employed as the doctor.

The duped insurance companies learn of the sickness. They have now discovered the amount of risks they have been cheated into taking on Dwight's life, and become alarmed. Dr. Porter, of Albany, is sent on 7th November, 1878—one week before Dwight's death—to examine him. (*Fol.* 670.) Dwight tells him of his "dreadful congestive chills" (*fol.* 675), and expressed his fears that "if he should have another such an attack in his weak and depressed condition he would probably not survive." (*Fol.* 675.) The doctor describes his appearance. "His voice was clear and his tone loud; his enunciation distinct; he expressed himself with precision, clearness, and force; his skin was of natural moisture—no harshness; his muscles firm; the extremities warm; his countenance appeared natural—color in his cheeks and lips," &c., &c. (*fol.* 676, 677); "the heart was normal—the beating was perfect; the lungs seemed normal—the respiration clear; the liver normal," &c., &c. (*Fols.* 677, 688.) *He had had no fever or sweating* (*fol.* 680); his pulse and temperature all through

his sickness had been normal (*fols.* 685, 686); and his pulse and respiration when Dr. Porter saw him were entirely natural. (*Fol.* 686.)

The only thing that Dr. Porter discovered at all out of the way was a feeble circulation. (*Fol.* 681.) This, however, the doctor thought might have been due to the morphine and extract of gelsemium given him to quiet his nerves. (*Fols.* 683, 684, 685.) Dr. Wood expressly swears that these medicines would produce feeble circulation. (*Fol.* 884.) Avery and Lee swear they would (*fols.* 1056, 1140.) The slightly coated tongue (*fols.* 677, 686) he saw was of no significance. (*Fol.* 687.) The doctor did not believe him to be seriously ill (*fol.* 737), and so reported to his clients on his return to Albany. (*Fol.* 727.)

The doctor swears that he did not believe it possible for Dwight to have had congestive chills. (*Fol.* 737.) He describes the symptoms of that disease, wherein *fever always follows the chill.* (*Fol.* 755.) Dr. Wood also speaks of "105, 106, "107, and even a greater degree of temperature," and of the sweating stage that follows. (*Fol.* 887.) Dr. Avery says that it was not possible for a person having no variation of temperature for four weeks preceding death to have had congestive chills. (*Fol.* 1056.) Dr. Lee says the same. (*Fol.* 1140.) All this testimony is entirely uncontradicted; and when we come to the examination of Dwight's body after death, in a subsequent Point, it will be found that there was not a single sign of his having had such a disease as congestive chills.

That Dwight was nervous and sleepless was not at all strange in view of the work he had taken upon himself to do—the consummation of a design either to kill himself, or somebody else,

to serve as a corpse in his stead;—and that this nervous condition, with the drugs he was taking to subdue it, would have an effect upon his general state of health, is entirely comprehensible.

The alleged sickness continues. On the 15th November—the day of his death—Neri Pine calls Dwight's attention to the second quarterly installments of premiums coming due on the insurance policies. The first would become due on the 19th November. (*Fol.* 1465.) There was only \$5 or \$6 of Dwight's money in Pine's hands (*fol.* 1466), and it must be taken as a conceded fact in the case that no arrangements had been made by Dwight for money wherewith to pay them. About \$2200 was necessary. Dwight asked Pine to go the next day and see Dusenbury about borrowing money therefor. Pine admits that he did not know that Dusenbury had agreed to advance a cent. (*Fol.* 1466.) If the payments are not made the policies will be forfeited, and the whole scheme will fail.

We have come now to the day of the death of Walton Dwight—15th November, 1878—only four days before the premiums fall due.

Dwight on that day was no sicker than he had been for some days previously. He sat up part of the day (*fol.* 585, 586), had his beard trimmed (*fol.* 586), took a bath (*fol.* 605), executed and verified some law papers (*fol.* 504), "seemed clear" in his mind, spoke readily and freely, seemed "quite strong" (*fol.* 507), said "he thought he should have a good night" (*fol.* 588), and about 10 P. M. his wife retired to another room, and went to sleep (*fol.* 1241) in a room with her sister, Mrs. Owen. (*Fol.* 589.)

Dwight was left alone in the charge of a man by the name of Charles A. Hull. (*Fol.* 590.)

Dwight had told Hull on Wednesday—two days before—that he wanted him (Hull) with him on this Friday night, “*because he would be cool and unexcited if anything should happen.*” (Fol. 1266.)

This man Hull had been a lawyer (fol. 1239), a printer (fol. 1250), a cigar manufacturer (fol. 1250)—in short, was a business tramp, was a professed infidel, believing in no God or government of God. See the picture he draws of himself at folios 1253 to 1264, and also at folio 1250.

Death.

About 11 o'clock that night Dwight ate a cracker, and told Hull that “he had a new way of keeping it down.” (Fol. 1287.) How? *Was it with a rope?* About fifteen minutes thereafter he is claimed to have gasped, and called “Charlie.” (Fol. 1244.) Hull swears he called Mrs. Dwight immediately. (Fol. 1296.) Mrs. Dwight hurried to the room, partially dressed. (Fol. 591.) She came in in one and a half to two minutes. (Fol. 1298.) Mrs. Owen, her sister, followed in two or three minutes. (Fol. 591.) Mrs. Owen found Hull and a man named Spaulding (the proprietor of the hotel where Dwight was boarding) and Mrs. Dwight—these three—alone in the room, and standing in front of the bed. (Fol. 595.) *Dwight was dead.* Mrs. Owen said “he never spoke or moved, or gave sign of life,” after she went into the room. (Fol. 595.) *Neither Mrs. Dwight nor Spaulding is called as a witness.* The plaintiffs rest their case upon Hull’s evidence of the death-struggle. This death must have occurred between 11¼ and 11½ P. M., as Hull called Mrs. Dwight, as we have seen, about 11¼. At 11½, or a few minutes thereafter, the undertaker was there (fol. 1202), although living a quarter mile away (fol.

1202)—*was there before the doctor.* (Fols. 1183 1184, 1202, 598, 1732, 1733.) Mrs. Dwight returned to her bed again about 12 (*fol.* 598), and Dwight was stretched out on his plank, having been undressed, washed, and redressed for the grave, by 1 A. M. (*Fol.* 1204.)

We leave this dramatic death-bed, with its plainly visible marks of *unnatural preparation*, as shown by the testimony, to describe it more fully hereafter in discussing the point of suicide.

Let us make another stopping place here. At our last one we asked the question if Dwight's *utter insolvency—gaining by false representations* immense insurances upon his life and trying to, get \$140,000 more—paying premiums *with borrowed money—contriving by quarterly payments* of premiums to get as many policies as possible—*disappointed* in all his business schemes—*without means of support—with no desire to live* if his family were provided for—comported with an honest intent toward the Insurance Companies.

At this second stopping-place we ask another: Does the will, prepared as it was, *as a part of this transaction*, with its *posthumous argument* to defend himself against expected questions of dishonest intent, bearing upon its face the evident intention that it should very soon after execution *speak as a will—does his pretended sickness* immediately after effecting his insurances—*does his inability to meet the premiums* falling due—*does his death*, just before the same fall due—harmonize with an honest intention of Walton Dwight?

Up to this point, in our argument, we have been discussing this question of dishonest intent of Dwight without settling *how* the intent

to cheat would manifest itself; whether by a suicide or a substitution of a corpse. It was impossible to do so, and besides unnecessary to do so. The fixed facts in the case, pointing indisputably to fraud, *met either hypothesis*. The way in which the cheat should be finally accomplished was probably not determined until after the insurances were effected. We therefore do not see in Dwight's deliberate—determined—systematic method, when at work negotiating for and getting the insurances the marks of trepidation or nervousness which we might perhaps have looked for if he had then determined to take his own life. The plaintiffs, however, have proved that Dwight died that night of the 15th of November and produced the indisputable dead body for our examination. We accept the death. Dwight's *intention* to cheat the insurance company, so plainly to be read in the testimony, we shall show hereafter *has finally culminated in the act of suicide*.

To this simple story, as told by the evidence, are any words of argument needed to prove our point, that Walton Dwight sought for and obtained these insurances with a dishonest intent. The hypothesis of an honest purpose does not harmonize with and will not encircle all the facts. Honesty may comport with insolvency, poverty, and disappointments; *but not with incurring obligations which it would be impossible to meet*. Honesty would not draw such an *unusual will* with its defences of *anticipated assaults on good faith*; and with provisions, *showing that it was speedily to speak as a will*. Honesty could not use *lying representations and pretences and helpful contrivances* to accomplish ends. The concept of honesty must be at once dashed out of

the mind. The only hypothesis which can reconcile all the facts—the one that the facts *drive* us to accept—is the one *that Walton Dwight obtained the policy in suit with the dishonest intent ultimately to cheat the appellant.*

As a supplement to the above narrative it may not be amiss to draw Dwight's traits of character as they are shown by the evidence.

(1st.) His moral nature was feeble and weak; could not stop him from using dishonest means to reach an end. See the story that Norman W. Batchelder tells about his telegraphing a lie to the Union Mutual Insurance Company to, prevent return of policy (*fols.* 640, 2488, 2489, 2490). Read his wife's petition as a creditor to the United District Court to have him declared a bankrupt (pages 140, 141), wherein she accuses him of dishonest acts in regard to his property. Compare her sworn statements therein of Dwight owing her \$75,000 in notes, (*fol.* 420) with Dwight's sworn statement that he had given her none (*fol.* 416); see also under Point V a detailed account of his falsehoods in his applications for insurances.

(2d.) He was intelligent—above the average. See his will which he drew, with Judge Loomis to keep it in legal shape (*fol.* 1437). Its bold bluff style is Dwight's throughout. See his letter to Bennett, proposing compromise (page 137 and the schedule it enclosed, page 762).

(3d.) His avarice was immense; but it was of the *rapacious*, not *tenacious* kind. He could not keep his gains. It gave him pleasure to be extravagant (*fol.* 413) as well as to be generous and to bestow. (See his will).

(4th.) He was not content with small earnings and savings. He said "it was better to be in hell than be poor" (*fol.* 862). He reached after big schemes—making money in large masses. See Canada scheme, grain speculations, Dwightville and its hundreds of thousands spent for improvements (*fol.* 413).

(5th.) He was bold and courageous. He had been a soldier and had his scars (*fol.* 1871). He was fearless in large speculations. While Herdic was trembling as to Canada scheme, Dwight was unmoved; while having hemorrhages and cough he could laugh, joke and curse about them (*fol.* 329).

(6th.) He was vain. He tells of his head being worth \$10,000 to \$25,000 a year (*fol.* 1049)—of his going to Chicago to teach them how "to make corners and to make money" (*fol.* 863).

(7th.) With the traits of a thief he had the sympathies of a saint. He loved his wife and son. In his will he speaks of "my darling wife, the best and truest of women" (*fol.* 2625); "of my much loved and only son Frank" (*fol.* 2624). This was not pretence. In his poverty and disappointment his only remaining ambition was to "leave them comfortable and with sufficient means to live as they had before" (*fol.* 2633); he says the same to Mr. Phillips (*fol.* 548). But it is this earth's mystery, that this *virtue*—this love of wife and little ones—is oftentimes the sharpest incentive to *vice and crime*.

Given these traits of character which the evidence shows Dwight to have possessed, the conclusion is not a forced one, from his make-up by nature, with its strong, vigorous physical and mental framework—with feeble moral force—am-

bition to make money for the pleasure it gave his generosity to bestow on family and friends—disappointed, and finally tired of life—pushed on by poverty and his love for his family—that he should concoct and attempt to carry through some such scheme as this—even at the cost of his life. Nor is it at all wonderful that a fraud such as this, worked up by such a man, whose generosity when alive endeared him to his friends, and who after death showered his gains upon them, should be looked upon kindly, as it has been by courts, jurors and the public, within the *atmosphere* of his friendships, where this cause was tried. We scorn little paltry thefts, but we admire the daring, generous thief who steals with pomp and circumstance, and gives away what he gets. Robin Hood was an outlawed thief, but historians speak of him as “the prince,” “the gentle thief.” He pillaged the rich, but he gave to the poor. The poor defended him against the law, and for four hundred years England named to his memory a holiday.

V.

Walton Dwight made false and fraudulent representations in his applications for insurance to the appellant.

Let us, before we commence the discussion of this point, push to one side the paltry plea that Henry C. Hermans was the agent of appellant in the negotiations for the policy in suit.

Hermans was in the employ of the Phoenix Ins. Co. (*fol.* 1507). Dwight wants \$100,000 insurance. He goes to Hermans (*fol.* 1509). Hermans writes to the appellants about it and asks what brokerage will be allowed (see letter, exhibit 108, folio 2673). The appellants reply (see letter, exhibit 109, folio 2674). Hermans sends the application for \$10,000 (see letter, exhibit 110, folio 2676). Hermans applies again August 28th, asking that policy be increased to \$15,000 or \$20,000 (see letter, exhibit 111, folio 2677)—and the policy is thus increased—Hermans gets brokerage or commissions from the appellant.

What does this state of facts show as to Hermans' agency? Undoubtedly that he was in a certain sense *the agent of both parties*—of Dwight to make the application and of the appellant to deliver policy and to receive premium, receiving compensation from them therefor. If he was in another and more enlarged sense the agent of both parties, then the policy would be void for that cause alone. (Bliss on Insurance, Sec. 285.) *Do the plaintiffs want to meet that difficulty* also among the many others they have in the case? We shall not discuss it—but the question stands as an open one—*is not this policy void for the reason that Hermans was acting as agent of both parties?*

The object of the testimony, beyond all doubt, was to try to make Hermans the appellant's servant *throughout*—and that, inasmuch as he wrote the application to make the appellant thereby a party to the misrepresentations. It was also expected, doubtless, that Hermans would father Dwight's misrepresentation about insurances in the N. Y. Mutual Life and Connecticut Mutual Life. But he utterly refuses to do so, and swears

that "Dwight stated to him that he had policies in each of these companies." (Fol. 1529.)

It will be noted right here that neither Hermans nor any other witness swears that the application for policy in suit, or for any other policy, embodied any other answers than those of Dwight to the questions asked. There is testimony, however, that Dwight relied entirely upon himself in making his answers, *answering from written slips* that he carried in his pocket. (Fol. 545.)

But suppose that Hermans was the agent of appellants in receiving the application—if the answers were untrue it is necessary, in order to avoid the consequences of the misrepresentations, to show *that they were not Dwight's answers*. There is not a pretence of such evidence in the case.

See Bliss on Insurance, Sec. 293.

Let us also say, by way of preface, that we take the point above, although not obliged to do so to avoid the policy in suit. We shall show hereafter that every representation made by Walton Dwight in his application *was a warranty*—the *literal truth* of which was necessary, or the policy was void. We state the broad proposition, however, in our point, that Walton Dwight made representations falsely, *and knowing them to be false*. We do so because the evidence sustains us, and we prefer to show that this scheme of Dwight to plunder the insurance companies *began* with an original fraudulent design, and was *carried through to its end* with fraudulent contrivances and acts.

The above is our proposition—Point V. We claim in few short words *that Dwight has lied* in answering questions in the printed and written ap-

plication for insurance which he has signed with his name. (Ex. 21, page 788.)

A. He lied knowingly when he answered the question, "In what occupation has he been engaged for the *last ten* years?" that he had been "*a real estate and grain dealer.*"

The answer was a negation of other business. (Bliss, Sec. 112, page 152.)

The burden of proof was on us to prove its falsity. We accepted it. We bring forward against Dwight his *sworn declaration* as to his business between the 26th day of May, 1874, and the 8th day of March, 1877—about three years of the ten that he was inquired about, where he swore expressly that between those dates "*the Dwight House was the only business he had as a regular business.*" (Fols. 397, 400.) Dwight understood what he was testifying to. He uses the term "business" exactly in the sense of "occupation," as the Judge defined it at folio 2073—"the general business in which a man is engaged."

He does not say, even, that he had any real estate or grain business *as speculations* during that time, but says "*the Dwight House was the only business.*"

We might stop here, without going farther. The inquiry was as to the *last ten* years before the application. His answer negated the fact of keeping hotel. He has lied, as we see, as to three of them. But we go farther.

In the same examination *he* is asked the question, "From that time" (1868 was the date referred to) "down to the time of the commencement of the Dwight House business" (which the

previous answer gave as May 26, 1874) "*had you any business of your own?*"

Answer: "*I had not—not farther than my law suits, general living, and the like of that. I had no business of my own.*" (Fol. 401.)

* Here are 9 of the 10 years covered by the question, and every kind of business negatived during that time except that of the hotel, which he negatives in his application for policy in suit.

In short, during 6 of the 9 years Dwight confesses himself to have been at the most a *general adventurer—a business tramp*—just exactly the kind of person that a life insurance company would not insure if they knew it. And the question is asked in the form that it is, so that an insurance company can know, *if a true answer is given*, if the applicant during ten years has shown a character of a *regular business man*, with *regular business habits*.

The question was pointed, as it was, to learn the extent of the *moral risk* that would be accepted by issuing a policy on the life. It was *material*, therefore, *on its face*, although, as we have said before, its materiality must be assumed, *because it was asked*. Bliss, Sec. 42.

The Court below attempts to parry the force of this evidence by saying "it is not an estoppel"—"that it is to be taken with other facts in determining whether or not the answer was true" (fol. 2071) and then alludes to the Binghamton property and its improvements—to 10,000 acres of land in Wisconsin as belonging to him (whereas Dwight had sworn in the same examination that it *belonged to his wife*, fols. 416, 417, and was her business fol. 397), "that the land was assessed to him" (fol. 2072), (*of which there is not a particle of proof, and the fact*

would be unimportant if there was), "that the rents amounted to a very considerable sum" (*fol.* 2072), of which, also, there is no proof, or that Dwight received them; and would have been of no importance if he had to constitute him as a dealer in real estate. All which was excepted to. (*Fol.* 2198). All that the Judge really does find in the case to warrant the answer that Dwight was a real estate dealer is that he *owned* an undivided half of real estate in Ohio, worth \$150. (*Fol.* 412.) Ownership of one or more pieces of real estate is not dealing therein.

But suppose that the Court was right and that the Binghamton and Wisconsin property was Dwight's—Does the *ownership* of that property make real estate his *regular business*?—And, more than all, does it contradict in any way his sworn testimony that from May, 1874, to March, 1877, his *only* business was keeping a hotel? *That* business, for at least more than three years, was specifically inquired for in the application for insurance, as we said before, to give information as to the moral risk the Company would take if they insured Walton Dwight. This false, and as we have shown, *knowingly false* answer denied to them the benefit of the truth in deciding if they would issue a policy.

As to the answer of Dwight that he was a grain dealer, testimony heretofore referred to contradicts it (*fol.* 401), and there is not in the case any evidence of his ever having dealt in grain except in the year of his death; the instance testified to by Phillips when he made with his partners \$30,000 and lost it all afterward. (*Fol.* 542.)

The Court, at the close of the proofs, was asked to nonsuit the plaintiffs for this uncontradicted evidence of fraudulent representation of

Dwight's. (*Fol.* 2022.) It refused to do so, to which the defendant excepted. (*Fol.* 2048.)

This was an error for which the judgment should be reversed. It made no difference that death did not intervene from the cause to which the misrepresentation was directed. (Bliss on Insurance, Sec. 40.)

At the cost of logical arrangement but in order to place the examination of the Judge's charge and the jury's verdict in closer association with the facts we are discussing, let us review each here.

We have seen under Point III (*ante* page 14) :

1st. That any fraudulent misstatements avoid a risk, and preclude any inquiry into their materiality. (Bliss on Ins., Sec. 40.)

2d. That a fact specifically inquired about is made material by the act of the parties, and cannot therefore for that reason be questioned. (Bliss on Ins., Sec. 49.)

Let us quote here, also, the following references to the law :

"Where the representations upon which the contract of insurance is based, are in writing, their interpretation, like that of other written instruments, *belongs to the Court.*"

Bliss on Insurance, Sec. 56.

"On the trial it appeared that the party's life had been proposed at two other offices and rejected, and the Judge having left it to the jury to say whether there was any concealment of any material fact, this was held to be an error, for the assured had agreed to answer truly, and

"the question whether an answer given was more
"or less material *was not open to him.*"

Bliss on Insurance, Sec. 134.

See also May on Insurance, Secs. 185, 186.

Now what was the plain duty of the Court if it refused the nonsuit? Here was the uncontradicted, unexplained evidence showing Dwight's answer to be not only false but false to his knowledge, *and therefore fraudulent.* The fact, too, had been inquired about specifically in the application, and had therefore *been made material by the parties.* The law therefore required *literal truth.* The court had correctly charged that it required literal truth. (*Fols.* 2209, 2210.) Only one course was open therefore to the Court, viz: to charge the jury that Dwight's answer *being thus untrue* the defendant was entitled to their verdict. The Court was asked so to charge and refused (*fol.* 2210). In place of following the plain directions of the law above laid down, it left to the jury the following question to be answered by them—one of a series of questions into which the Court says it "divided the jury's duties" (*fol.* 2057)—

"Was the occupation of Walton Dwight, for ten years preceding Aug. 22, 1878, real estate and grain dealer, *within the intent and meaning of the contract?*" charging thus under an exception, "if you find that it was—that the answer of Dwight was a fair and true answer *within the meaning of the contract,* you will write the word 'yes' under the question" (*fol.* 2073). To which the jury, under the charge of the Judge (*fol.* 2071, 2072), which plainly showed his opinion in the affirmative—using facts in his charge of which there is no pretense of proof in the case—have answered "yes."

As the question was submitted by the Court, the jury, *under the guise* of passing on the question of fact whether Dwight *ever made* such a false representation as above contended—about which and its falsity the evidence is entirely one way—have passed *on the materiality of the representation to the risk*. The Judge's charge not only involved that it was their duty to do so by the words "within the intent and meaning of the contract" expressed in the question he framed for them to answer, but the jury's answer cannot be accounted for in any other way without ascribing to them *plain perjury*. The evidence, without contradiction or explanation, had shown that Dwight's business *had been a hotel keeper exclusively* for three of the years inquired about, and that he never had been a real estate dealer.

For this evident error of the jury their verdict should be set aside.

The Court refused to charge the jury that if the *principal* business of Dwight was not real estate and grain dealer, the plaintiff could not recover (*fol.* 2210); and this in the face of his charge that every answer made by Dwight was agreed by the parties to be material, and the sole question being whether such answers were true.

B. He lied knowingly when he answered "No" to the following question: "Is he now, or has he "been, engaged in or connected with the manufacture or sale of any beer, wine, or other intoxicating liquor."

Walton Dwight, in his same examination in bankruptcy, 18th December, 1877, after speaking of keeping the Dwight House *and livery* (*fol.* 397), opening it in 1874, and closing it in 1877

(*fol.* 400), swore, "Liquors were sold in packages. "I think I had some \$2000 or \$3000 worth of "stock when I opened the house. I took out of "my private house some \$600 to \$700 worth of "liquors that were not invoiced. I kept wines, "liquors and cigars all through my business." (*Fol.* 398.)

We also prove licenses to him *in his own* name, to sell liquors at the Dwight House for each one of those years (*fol.* 387)—that *he* paid U. S. Rev. taxes on the same for 1874, 1875, 1876—also the sale of liquors at the house for those three years—put as an exhibit in the case one of the bottles in which liquor was sold, marked in the glass "Dwight House." (*Fols.* 391, 392, 393.)

Here again is the entire falsehood of the answer of Dwight, shown not only by his own testimony, but by other evidence. (See, also, admission in other applications *that he had sold liquor.*) His answer is not only *made material* by a specific inquiry (Bliss, Sec. 42); but it is evidently one which a life insurer *ought to know about*. It affects the question of *moral risk* about which we spoke before. A sale of liquor involves its being within reach or under the control of the seller. This, again, involves the chance of temptation and the formation of habits of intemperance—so intimately involved in the risks taken by a life insurer.

This question of "moral risk" is ever present, both in cases of life, fire and marine insurance—in *personal character* of the applicant—his *age* denoting whether habits for life have been formed—his *occupation* whether uniform or varied—sometimes his financial standing (see *Valton vs. Nat. Fund Life Ass'n Co.*, 20 N. Y., 32)—in fire insurance, where buildings are unoccupied, and

where risks are rejected, unless the applicant is known to be above suspicion. Two parties may go to an insurance company for a life risk—one shall be young—healthy—temperate, but just starting the sale of liquor. The other shall be a man of or past middle age—temperate—and has been engaged in the business 20 years. The former will probably be rejected, although the better life on account of youth—while the latter will be accepted. Why? Because the very youth of the one applicant shows that he has not yet shown his ability to withstand the temptations of his calling. The other applicant has.

Two different men call for insurance upon unoccupied buildings, where risk of fire is the same. The one is young—with business habits (which have so much to do with moral habits), unformed—and his risk is refused. The other is taken because he is older and his character has shown itself to be trustworthy.

It is to get at—to learn as much as can be about, the thousand dangers of a life risk—that all these pointed questions are asked, and the answers made a part of the contract; warranties—by the policy. Dwight defeated all this by falsehoods and concealments of his schemes, and it does not lie in his executors' mouths to say that he did not die by selling liquor. Had he answered *that* and all other questions truly (about which we will say more hereafter), this appellant and the other unfortunate dupes of Walton Dwight's frauds would not be in Court contesting their policies. *None would have been issued and Walton Dwight would have been alive.*

Does this Court believe for one moment that if Walton Dwight had told about his past life and

health truly—that he was utterly insolvent and was applying for \$390,000 of insurances upon his life—having no business or means of support, that he would have obtained one dollar upon his life ?

But to return. The falsity of this answer of Dwight's has been shown, as we before said—and to his knowledge—not one word of evidence contradicting it. We were entitled for that cause to have the case dismissed. The motion was made, denied, and exception taken. (*Fol.* 2043.)

The jury, as we said before, had no business with the question, except perhaps to give a verdict upon it for the defendant under a charge to that effect from the Court. (See ante pages 41, 42.)

Now see how this question is treated in the Judge's charge. Two questions are asked for the jury to answer.

(*1st.*) Was Walton Dwight *engaged* in the sale of any beer, wine, or other intoxicating liquor, at any time within five years prior to August 22d, 1878, within the intent and meaning of the contract ?

(*2d.*) Was Walton Dwight connected with the sale of any beer, wine, or intoxicating liquors, at any time within five years prior to August 22d, 1878, within the intent and meaning of the contract ?

In the first question the word "engaged" is used—in the second, the word "connected."

The Court first concedes that "it is not disputed" that Dwight kept the Dwight House—that he "sold wines and liquors," &c., &c.; "but he sold them *in bottles*" (*fol.* 2076). Then, at folio 2077, it repeats the plaintiffs' counsel's paltry argument,

that the question being a "compound one"—asking about the "manufacture or sale"—and therefore could as well be answered truthfully No as Yes—that therefore the answer *No was truthful*. We are not ridiculing the position, and refer the Court to the charge (*fols.* 2077, 2078), in which this argument of the plaintiffs' counsel is not condemned, but, on the contrary, repeated, for the jury's consideration. Is it necessary for us to say here, in answer to this ridiculous position, that the question called for the *truth*; and that if Yes or No would not be the truth, other words should have been used to express it? Chief Baron Pollock says, in *Farlie vs. Mentor Life Assurance Co.*, 3 E. & B., 48, "It is trifling to say that "that is a true answer which requires something "to be added to it to make it true." *Why did not the Court thus tell the jury?* On the contrary, it says: "Gentlemen, you have heard the evidence "in respect to this question. I have gone over it "substantially, and it is for you to say whether, "taking the question as put, *and the purpose for "which it was put, it was fairly and truly answered.*" (*Fol.* 2080.)

With the charge thus given on the two questions presented, the jury, in the teeth of the uncontradicted testimony that Dwight for 3 years—from 1874 to 1877—sold liquor in the Dwight House, have answered that he has neither been "engaged" nor "connected" with the sale of same for 5 years anterior to August 22d, 1878. Of course, we claim the verdict is against evidence.

To the words italicized in the above extract from the Judge's charge—"and the purpose for "which it was put"—an exception was justly taken. (*Fol.* 2198.) The charge clearly left *the materiality of the truth* to the consideration of the

jury. That was necessarily involved in the expression "purpose for which it was put." It was telling them in so many words this: "If you find, "from the purpose of the defendant, that the "question was one where an answer truthful or "false would make no difference, *and was therefore immaterial*, then you can say that Dwight truthfully answered No to the question in the "application, notwithstanding the positive evidence that it was a lie."

How could the Judge charge as he did, that the question could be found "to be truly and "fairly" answered "No," when he admits *that there is no dispute about Dwight having sold liquor from 1874 to 1877 ? (Fol. 2076.)* Take it even "for "any purpose" that the question was asked, how could he tell the jury this in view of the facts ?

Note exception, *fol. 2170* ; also, refusal to charge, at 2210.

Juries have nothing to do with the question of materiality of answers in an application for insurance. We have cited the authority before
 {See May on Insurance, Secs. 185, 186—Bliss on Insurance, Sec. 56.

C. He lied knowingly and deliberately when he stated that he was insured in New York Mutual 15-year endowment, \$10,000 ; Connecticut Mutual, Ordinary Life, \$15,000 ; Washington, Ordinary Life, \$10,000.

On the 19th day of August, 1878, there was a policy on Dwight's life issued from the home office, by the New York Mutual Life Insurance Company, for \$10,000 ; term, 15 year life. On the 27th day of August (the same month) it was ordered returned. On the same day it was re-

turned (see Ex. 4, *fol.* 2320), and was destroyed, *never having been delivered (fol.* 199), *or premiums paid (fol.* 200). This is the history of the New York Mutual Life Policy.

The Connecticut Mutual Life Insurance Company also issued a policy on Dwight's life, dated August 16th, 1878, *which was never delivered*. About the 23d or 24th September the policy *was ordered returned, and it was done.* (*Fols.* 258, 282.) No premiums had been received thereon. (*Fols.* 259, 282.)

The Washington Life Insurance Company also issued eight policies on Dwight's life, amounting to \$10,000, dated August 19th, 1878. These policies *were delivered August 31st, 1878 (fol.* 547).

It will be seen that two of the above policies were *never delivered*; and that those issued by the Washington *were not delivered, or the premiums paid*—and were *therefore not operative*, until August 31st, 1878. The application for the policy in suit is dated August 22d, 1878—9 days before.

It will be noted, too, that these policies issued by Washington Insurance Company have all been demanded back on account of frauds by Dwight in the representations as to his health (*fol.* 550)—frauds, too, that Dwight admitted (*fol.* 550); and while refusing to give them back, he said to the Company's agent, "You are all right, as far as your Company is concerned; but I want to keep the policies." He said "if he gave up the policies, the other companies would learn the fact, and that he could get no more insurance" (*fol.* 551), asking the agent *to say nothing about it*, because, he said, "I am going to have insurances, and the companies have got to pay them." (*Fol.* 552.

No matter now about the demands back of these policies, and Dwight's confession that the demands were just. The point we wish to make is, that he untruly stated in his application for the policy in suit that he *was insured* in the Washington for \$10,000 in addition to the New York Mutual Life and Connecticut Mutual for \$25,000.

Dwight, of course, knew, when he made the answer to the question in application to appellant, that he had not received, or paid the premiums on the policies he claimed to be insured by, and therefore had no insurances in those companies. Knowing this, he not only falsely, but fraudulently asserted that he was insured in all three of them.

We repeat again what we have said before, that the answers are made material by reason of being specifically inquired for. *They are material also on their face*—Dwight, in applying to the appellant, claims to have policies underwritten by such old, responsible, experienced and well known companies as the New York Mutual Life and Connecticut Mutual Life companies, as well as that of the Washington. Lord Eldon (in a case cited and approved by the New York Court of Appeals—*Valton vs. Nat Fund Ins. Co.*, 20 N. Y. Rep., 32) said, “that if a person meaning to effect an insurance exhibited a policy underwritten by a person of skill and judgment, knowing that this would weigh with the other party and disarm the ordinary prudence, and it turned out to be false, that the law would vitiate the policy thus obtained.” The Court of Appeals, in the case cited (20 N. Y. Rep., 32), give the reason why—“Because it induced a confidence without which the party would not have acted.”

On account of these fraudulent representations of Dwight in his application for the policy in suit—upon matters made material by the parties and also material on their face—the Court, on the motion for nonsuit, should have granted it (*fol.* 2044.)

The jury had no business with the question, for the reasons heretofore given, except possibly to render a verdict for the defendant (pages 40, 41, ante).

Bliss, Sec. 56.

The Court should have charged them that the plaintiffs could not recover if at the time of the application for the policy in suit Dwight was not insured in either the New York Mutual Life or the Connecticut Mutual Life. On the contrary, it refused (*fol.* 2218), under exception (*fol.* 2222), although in the 3d request to charge (*fol.* 2209), to which the Court assented, it had laid down the law correctly that “by the contract of insurance “involved in this action the materiality of each “and every answer made by Dwight to the questions contained in the application was agreed “to by the parties, and the sole question as to “each of said answers is as to whether or not the “answer is true.”

No specific question was framed by the Court for the jury to answer on the point we have been considering. The jury, however, by their general verdict for the plaintiff have either not considered the point at all, deeming it of no importance from not having been charged thereon—or they have, against the uncontradicted evidence, found that Dwight answered the question truly.

The verdict must be set aside as against evidence.

D. Dwight lied outright, knowingly, when he answered "No" to the following questions—whether an assurance has been applied for with this or any other Company without having led to an assurance—if so with which Companies—for what reason did the application not lead to an assurance?

At the date of the application in suit, (August 22, 1878,) Dwight had applied to the Mutual Life for \$25,000 and to the Connecticut Mutual Life for \$15,000 on 31st of July, 1878 (see pages 66, 774), which as we have seen never resulted in insurance—*the policies having been recalled*—(ante pages 47, 48). He had also applied to the Washington Insurance Company August 15th, 1878 (Ex. 24, folio 2371), upon which no policy was delivered until August 31st, 1878 (see ante page 48, folio 547), and consequently no insurance effected until then. He had also applied to the John Hancock, August 21st, 1878, for \$10,000 (*fol.* 2344)—to the Phoenix August 15th, 1878, for \$10,000 (*fol.* 2357)—to the Globe Mutual August 20th, 1878 (*fol.* 2361) and to a large number of others (see applications in exhibits, pages 791 to 807), upon which no insurances had *then* resulted (see policies, pages 831, etc).

The object of this question is manifestly twofold.

1st. It is to learn *the amount* the applicant has endeavored to get insured on his life.

2d. To know *the cause of the rejection*.

But it was not sufficient for Walton Dwight to content himself with the state of facts existing at

the time of his application—August 22d, 1878. If they had become changed before he received his policy, which was issued from the home-office August 28, 1878, *but was not delivered or the premiums paid until the 4th day of September, 1878 (fol. 2248)* it was his duty to have brought such change to the notice of the Company. The contract of insurance between parties does not become complete before delivery of policy and payment of premiums.

“A representation, in an application, is a *continuous statement* from the time it is made, during “the progress of the negotiation and down to the “completion of the contract—and though, in point “of fact, the representation was *true when actually “made*, yet, if by some change intervening between that time and the time of the completion “of the contract, *it then became untrue*, it will “avoid the contract if the change be material, and “to the prejudice of the insurers.”

May on insurance, Sec. 180.

“The representation in law dates from the time of the completion of the contract, and, therefore, if after the representation is actually made, a material change occurs before the contract is consummated, it is the duty of party to inform the Company.”

Bliss, Sec. 95.

In the case cited by Bliss, in above section, Vice Chancellor Malins decides “that the declaration, though made on the 19th of June, must be treated as a *continuing declaration* up to the *time of the paying of his premium*.” The policy was delivered and premium paid *in September*. The insured had been examined by the Company’s physician, in July, as a *first-class life*, but at an increased rate on account of corpulency. In

August, pending the completion of the contract, he was told by another physician that he had a disease of the kidneys, which he did not communicate to the Company. It was held that the requirement to disclose his latest medical attendant was a *continuing* one, as above.

Bliss, Sec. 55, *pages* 129, 131.

Now how far does this principle reach, and what applications does it cover which did not result in insurances?

Every single application, of the whole \$390,000 applied for, was made before September 4th, except the following :

Metropolitan Life, application September 4, 1878,
\$10,000—policy granted.

Knickerbocker Life, application Sept. 6, 1878,
\$5000—policy refused.

Union Central Life, application Sept. 7, 1878,
\$5,000—policy refused.

Manhattan Life, application Sept. 9, 1878, \$5000,
—policy granted.

The Court will please note applications for policies and their dates on pages 770, et sequitur. The date noted on each application must be presumed, in the absence of other testimony explaining it, to be the date on which it speaks as an application.

Dwight, in his application for the policy in suit, on the 22d day of August, only claims to have received policies for \$45,000 of this amount; and we have already shown, under sub-point C, that he *never received* policies for \$25,000 of this from New York Mutual Life and Connecticut Mutual Life, and *had not then received* the policy of the Washington, for \$10,000. This would leave only a completed insurance in the Equitable for \$10,000,

and consequently *the applications to the other three had not then led to insurance.*

Dwight therefore, when the policy in suit was issued, had made applications for \$355,000 of insurance. If any part of this had resulted in insurance it was his duty under the rule of the law we have cited to have reported it to the appellant as a correction of his answer given to a previous question discussed under sub-Point C—and then also to have reported the amount of applications still outstanding *which had not led to insurance.* This last amount must have been very large. There were \$140,000 of rejections (see folio 2067), and as only \$10,000 of the applications were made after September 4th (the two to Knickerbocker and Globe Companies), there must therefore have been \$130,000 of applications then made *which had been then or were subsequently rejected.* But in addition to this there was a still larger amount *that had not then "led to insurance,"* upon which policies were subsequently issued—as only a small number of policies were delivered before September 4th, 1878.

Lord St. Leonards, in *Anderson vs. Fitzgerald*, 4 House of Lords Cases, 484 (quoted in Bliss, Sec. 134), says, "What could have been more material than the question '*Has your life been refused by any other office?*' Besides, it may be important to know *how much insurance* had been obtained, as some security against possible fraud."

Walton Dwight was bound, by the principles of law above cited, to have notified the Germania Insurance Company of these applications as well as of rejections, if any. His answer "No" negatived the fact of any applications as well as rejections. The fact inquired for was material on its face. The answer was also made a material one by

being specially inquired for in application. Instead of telling the truth, which would have put the appellant *on its guard and on inquiry*, by informing it that \$355,000 of applications had been made, Dwight left his original answer (which as we have seen was false as to a few applications), to stand, that he had made no applications, and, as a necessary consequence, that none had been rejected.

Dwight knew at this time, September 4th, 1878, at least that one application had been rejected—that to the New York Mutual Life policy. That policy had been recalled and returned to the Company on 27th August, 1878. (See Ex. 34—folio 2320.)

It is possible that Dwight had had rejections of his applications from other companies besides the New York Mutual. It was hardly time, however. His designs had been so secretive, that it took a little time before they became known. Then inquiries were set on foot. It was found that Dwight had falsified about his health (that is usually the first investigation), and the New York Mutual Life and Connecticut Mutual Life were able to withdraw their policies before delivery.

The United States—the Union Mutual—the Mutual Benefit—the New England Mutual Life, and the Washington Life, endeavored to recall theirs, and tendered back the premiums.

Dwight's denial, however, at the time of the application to us for insurance of his ever having made an application to any other Company which had not led to insurance—his not having informed us then, when specially interrogated, of the large amount of insurances that he had then already applied for—and, more than all, his not

having advised us at the time of the delivery of the policy in suit of the vast sums that he had been endeavoring in the interval to obtain upon his life, which he knew the printed questions of the application made material to the risk—and which he, also, as an intelligent man, knew would have influenced our decision against accepting a risk upon his life—made him guilty of such gross frauds and deceits as to give the policy issued to him no status whatever in a legal tribunal.

The motion for nonsuit, so properly made for for this cause, was denied. (*Fol.* 2046.)

Notwithstanding the appellant had shown conclusively Dwight's knowingly false representations in answer to the question of the application that we have been considering, even *at its date*, August 22, 1878—notwithstanding nearly every insurance that Dwight had applied for had not led to insurance on the day when the policy was delivered, and Dwight suppressed and concealed that fact by allowing his original answer to stand uncorrected—notwithstanding the Court admitted that Dwight's representations in application were all warranties of their literal truth (*fol.* 2209)—it refused to charge the jury that the plaintiff could not recover (*fol.* 2219, 2220). The jury therefore by their general verdict for plaintiff have either found against these uncontradicted facts or have ignored them, treating them as entirely immaterial to the case.

The verdict of the jury should be set aside for that reason.

E. Dwight told a wilful untruth when he answered "No" to this question in the applica-

tion: "Has the party *ever* been afflicted with "any serious illness, defect, or personal injury?"

Here was a question which, on its face, shows it to be material. It needs no law book to say that it was so. Dwight answers "No."

Now note the evidence of the untruth of answer.

Robert M. Forsman swears to Dwight's illness in March, 1867, at Williamsport (*fol.* 289)—of his coughing and hemorrhages—his confinement to his room and bed (*fols.* 291, 292, 294)—of his being under the care of Dr. W. C. Doane (*fol.* 291)—[it will be noted here that the application in the very next question asks, "What physician or doctor attended him in such illness," and that Dwight's negative answer to the first question is a denial that Dr. Doane had attended him]—of Dwight saying that "these "severe coughs would carry him off, some day, he "thought—spat a half pint of blood" (*fol.* 293, 294).

Peter Herdic swears to the same illness (*fol.* 322, 327), to his spitting blood, and that Dwight told him that he had hemorrhages of the lungs and thought it would carry him off some time (*fol.* 326.)

Chas. Bartles (*fol.* 348)—H. E. Taylor (*fols.* 359, 360, 374) both swore to his blood spitting and his having hemorrhages at this sickness, about which we will have more to say hereafter on the answer to the question about blood-spitting, *which he also denied.*

Anna C. Spackman also swears to this same sickness at the Herdic House in 1867, and to Dwight's raising mucus streaked with blood (*fol.*

373) and to Dwight's confession that he had had a hemorrhage (*fol.* 373).

Encie Herdic also swore to Dwight's declaration that he had had hemorrhages. (*Fols.* 1912, 1913.)

The post-mortem examination of Dwight's body by fifteen doctors, all in the interests of the plaintiffs except Dr. Swinburne, shows cicatrices, or nodules, on the apex of the right lung, which these doctors state "*are the results of old pulmonary phthisis*"—also "old adhesions in the left pleural cavity." (Autopsy, page 6.)

Dr. Swinburne swears unqualifiedly that "these cicatrices or nodules were the result of old tubercular lungs, and that the left lung was tied down by old adhesions." (*Fol.* 777.)

Three others of the plaintiffs' witnesses who signed the autopsy—Orton, Burr, and Richards—do not dissent on the stand from what they stated therein.

Dr. Wood says "the fibrous nodule in the lung is almost invariably the cicatrice of an old ulceration;—ulceration of the lung is a common cause of hemorrhage of the lungs" (*fol.* 895).

Dr. Lee says that a cicatrix or fibrous nodule is the result of old tubercular deposit (*fol.* 1141).

Against this overwhelming testimony that Dwight had had "a serious sickness," which he denied in his application, what do the plaintiffs adduce?

They call several witnesses who had been in Dwight's company at different times of his life—*at times when he was in health*—who swear that they had seen no hemorrhages. This, of course, was negative testimony of the weakest and most ineffective kind.

They call Dr. Hyde, who is willing either to be considered a *fool* when he signed the autopsy or a *knave* on the witness' stand. He swears that he does not think *now* that the nodules indicated pulmonary phthisis. (See this man's exhibition of himself, folios 1594 to 1622). He does not, however, deny that there were adhesions in the left pleural cavity, as he had stated in autopsy, and which speak so emphatically of an old inflammation either of lung or pleura.

They call Dr. Chittenden also—who, having once stated unqualifiedly that these nodules were the marks of old pulmonary phthisis, "is now "uncertain" (*fol.* 1755 to 1758). He, however, does not deny the "pleural adhesions" which he had before stated in the autopsy.

This is all the rebutting testimony.

Neither Dwight's wife, who was with him (*fol.* 307) in that sickness, nor Dr. Doane, is called. The Court excuses Mrs. Dwight from contradicting facts of which she, if any one, would have precise knowledge, telling the jury in effect that she *knows* them to be untrue, but shrinks from the ordeal of testifying (*fols.* 2112, 2113).

This strange defence by the Court of Mrs. Dwight not appearing to contradict the testimony if untrue, not only took from the defendants the benefit of the presumption which the law gave them from her not appearing as a witness, but gave to the plaintiffs the full benefit of *Mrs. Dwight's contradiction*. The Court tells the jury in effect that Mrs. Dwight *knew* the evidence about these hemorrhages and sickness to be untrue.

The Court shields the plaintiffs, also, from any adverse presumptions in not calling Dr. Doane. (*Fol.* 2111.) We offered to put Dr. Doane on the

stand, but the Court, on the plaintiffs' objection, closed his mouth from speaking what he knew. (*Fol.* 2111.)

If we have no right to say to the plaintiffs that they did not dare to break the seal from the lips of Dr. Doane, and let him *speak the truth on the witness' stand*, as to the seriousness of this sickness, we have at least the right to use the *acts* of Dr. Doane *off of the witness' stand*, *proved by the plaintiffs themselves*, to characterize the probabilities of what he would have said, if called, as to what that sickness was. Such acts do not point in favor of this being a trivial sickness. (*Fols.* 335, 336.) If this sickness was a trivial one, and Dr. Doane knew it, then Dr. Doane was personally and professionally a scamp in helping the defendants to prove it serious, which assistance the plaintiffs have proved. (*Fols.* 335, 336, 382.) We have no right to *presume* him dishonest, and must assume that his assistance was from just and righteous motives.

Notwithstanding the question in the application, to which we claim Dwight gave a dishonest answer in the negative was "Has the party *ever* been affected with a *serious* illness?"—notwithstanding the defendant's testimony showed most conclusively that Dwight, either in 1867 or *at some other time*, must have had a *very serious* affection of his right lung, leaving nodules or scars; and also of the left lung, or pleura, leaving adhesions — notwithstanding that Dwight, in speaking of his sickness in 1867, had expressed apprehensions of a fatal result—the Judge has referred this question to the jury thus: "Was the 'ailment of Walton Dwight at Williamsport in 'March, 1867, a mere *temporary* ailment, from 'which he recovered?' (*Fol.* 2114.)

The question submitted to the jury not only confines them to the sickness to be inquired about, to the year 1867, but is *suggestive* on its face that the "recovery" from such sickness made it a "temporary ailment."

In the charge to the jury the Judge not only, as we have seen, robbed the defendants of the *presumption* in their favor that Mrs. Dwight *could not contradict* the positive testimony which had been adduced, and gave to the plaintiff the full value of Mrs. Dwight's contradiction by telling them that *she knew the untruth of such testimony*—but he has done more. He has without the shadow of right—and without evidence to sustain him, charged the jury that Forsman's testimony as to Dwight spitting a half pint of blood was incredible (*fol.* 2108, 2109). He has told the jury that evidence of declarations are "*of the most dangerous species* (*fol.* 2179). He has told the jury to regard "with great suspicion" the evidence of Drs. Ward and Flint—two of the most distinguished and reputable gentlemen in this or any other land in their profession. These gentlemen had been called as witnesses, not simply to give opinions as experts, but to prove the existence of certain scientific laws, that the human body when under the operative force of a given cause, does and must invariably show in some of its organs, *certain* effects of that cause. True, the Judge, *after striking these blows*, salves over the wound by speaking some soothing words limiting his harsh criticisms. The scars *of the blows*, however, remain, and are clearly shown in the verdict of the jury.

The jury, under this charge, and under this unfair submission to them, have found that Walton Dwight's "*ailment*" in 1867 was a "temporary

"one," from which "he recovered." We ask *that* verdict to be set aside, as against evidence.

The jury have not determined—neither has the question been submitted to them—whether Walton Dwight "*ever had a serious sickness.*" If their general verdict is to be taken as a finding against such fact, then we ask that that verdict be set aside, as against evidence.

F. Dwight lied again when he said, in answer to the question "Who is at present the party's usual medical attendant?" "I don't have any."

We have shown, under our discussion of the previous point, that Dwight, by his answer "No" to the question whether he had *ever* had any serious illness, and not alluding, as we claimed he was bound to do, to the sickness in 1867 at Williamsport, misrepresented the facts. That same answer also, inferentially, denied that Dr. Doane was *then* his medical attendant, as he undoubtedly was.

If that sickness at Williamsport was Dwight's *last* sickness when a physician was called, before making the application for policy in question, and Dr. Doane was then his medical adviser, in the view of the question in the application he was bound to have so said. The purport and object of the question is to learn the name of the physician who last treated the applicant for sickness.

But let us go farther. Dwight says he had no medical attendant. Dr. Orton, who was his medical examiner on the application for the policy in suit, and all the others (see applications as Exhibits in printed case), says, also, that he was his medical adviser and attendant, and had been

ten or twelve years. (*Fols.* 1806, 1820.) How came it, also, that on the 1st August, 1878, in application to Mutual Benefit Company, he gave the name of Dr. J. G. Orton as such (*fol.* 2365); on the 15th of same month, to Phoenix, Dr. Orton (*fol.* 2357); on the 20th of same month, to Berkshire, Dr. Orton (*fol.* 2376); on 20th of same month, to Manhattan Company, George Burr and Dr. Orton (*fol.* 2382).

These applications were all *before* the one for the policy in suit—and they all contain therefore, an admission that Dwight lied in the application to us, that he had none.

In some of the applications, also *subsequent* to ours, these same names are referred to—to Brooklyn Insurance Company, August 30 (*fol.* 2427)—to Homeopathic Insurance Company, August 30, he mentions another name, T. L. Brown. (*Fol.* 2431)—to Knickerbocker, September 6th, J. G. Orton (*Fol.* 2452.)

The true answer to the question, giving the name of the medical attendant, is important, not, only because it is specifically inquired for (Bliss, Sec. 42) but that the insured may know whom to inquire of if they desire to know the applicant's state of health.

“When there is a question as to the medical attendant the question *must be fully answered*. “If the name of the last is asked, the name must be given, even though not a regularly educated physician.” (Bliss, Sec. 126.) See also cases cited by Bliss, Sec. 127, 128, 129, 130, 131.

“The object of reference to the medical attendants was to obtain the best information as to the quality of the life proposed, and it would seem that whatever be the form of the inquiry,

"the answer should be such as the applicant has
"reason to believe will best accomplish that pur-
"pose,"

May on Insurance, Sec. 304.

These misrepresentations of Dwight in the particulars named, which vitiated the policy, the Court below takes no notice of in the charge, nor are the jury directed in reference thereto. The general verdict for the plaintiff, in view of the uncontradicted and unexplained evidence—is therefore error.

G. Dwight lied in answer to the following question: "Has the party now, or has the same ever had, any of the following diseases?"—spitting of blood, &c., &c.—or of any other important organ?

To which he answered:

"Last spring, while in Chicago, I was generally out of sorts. Had rheumatism and trouble with my stomach. Was sick some three weeks. Was prescribed for by Dr. Allen Brooks, of Chicago, some three or four times, when I was wholly recovered, and have been well since. In 1869 I had something like dyspepsia, but nothing serious. No trouble since. To all these questions, *No, only as above.*"

The evidence of "blood-spitting disease" of Dwight is of three different kinds.

1st. Declarations by him of the fact.

2d. Acts of blood-spitting, accompanied by severe and racking cough.

3d. The autopsy after his death.

The first witness called on this question was Edward R. Secomb, whose testimony, in sub-

stance, is this:—that on the evening of March 28th, 1876, and next day, he was at Binghamton, looking after some mortgages. (*Fol.* 167.) He staid at the Dwight House, and had a conversation with Dwight, wherein Dwight made the remark that he had had a severe hemorrhage in years past, or at some time. (*Fol.* 169.) The witness was interested in Dwight's statement (*fol.* 175) because he had once had a terrible hemorrhage himself (*fol.* 178, 193), and he wanted to know if Dwight's symptoms were like his own (*fol.* 184, 185). Dwight said the hemorrhage was from his lungs, and not from the breaking of a blood-vessel or from his stomach, and that he had had a serious time with it. (*Fol.* 190.) The witness was interested also in the conversation from the fact of his son having suffered from hemorrhage. (*Fol.* 193.)

Robert M. Forsman swears that in the fore part of March, 1867, Dwight was sick at the Herdic House, in Williamsport (*fol.* 289)—that he then had a cough and hemorrhage (*fol.* 291)—was confined to his room and bed, and that he saw him spit blood (*fol.* 307)—that Dwight had severe coughing spells before the spitting of blood. (*Fol.* 292.) Dwight showed him a half pint of blood that he had thus spit. (*Fol.* 294.) *Dwight said that he had had hemorrhages.* (*Fol.* 293.) The witness gives his reasons why he remembers so distinctly about this, as he was interested in a land matter with Dwight, upon which a payment had to be made, in Canada about that time (*fol.* 303, 304).

Peter Herdic, also, swears to the same sickness; and details with particularity his anxiety about Dwight's health on account of the same land business in Canada which Forsman had testified

to, and his fears that Dwight would not be well enough to go, and that the purchase would be lost. (*Fols. 323, 324, 325, 342*) The witness speaks of Dwight's *severe cough*, and of his *always coughing* after laughing—it set him coughing. (*Fol. 323*.) He speaks, also, of having seen Dwight spit blood on the street (*fol. 326*); also in a bowl in his room (*fol. 340*). Dwight confessed to him that he had had hemorrhages, and “he expected it “would carry him off some time.” (*Fols. 326, 329*.)

Charles Bartles swears that in the spring of 1867 he went to see Dwight at the Herdic House, about the latter's wanting to sell witness's father some Canada lumber stock (*fols. 347, 348*)—that Dwight gave as a reason why he wanted to sell, that he had a lung difficulty, and had had a hemorrhage (*fol. 348*), and that he had more stock than he could carry without borrowing, and that he was not in a condition to borrow (*fol. 348*).

Horace E. Taylor remembers the sickness of Dwight at the Herdic House, and of his having a “hard cough” (*fol. 359*)—remembers of Dwight's saying that he had had a severe hemorrhage of the lungs (*fol. 360*)—of his saying he had had a “pretty close call” (*fol. 360*)—when he was ill he looked as though he had had a fit of sickness, was *very pale* (*fol. 361*)—remembers his paleness especially, and his severe cough (*fol. 362*)—his business interests with Dwight impressed the facts on his mind (*fol. 362*).

Anna E. Spackman remembers Dwight's sickness at Herdic House—of his coughing, and raising mucus streaked with blood (*fol. 373*). She also speaks of Dwight's having told her and her husband that he *had had a hemorrhage, in Michigan, some years previous* (*fol. 373*).

Encie Herdic, a hostile witness, though sworn by defendant, testifies that Dwight told her of having had a hemorrhage from his lungs (*fol.* 1912), and said "he expected his cough would take him off" (*fol.* 1925). This witness did not see Dwight when he was sick in his room (*fol.* 1910).

In this connection we refer to Ex. No. 50 (*fol.* 2480), which is a letter from Dwight to the President of the United States Life Insurance Company, dated September 11th, 1878, wherein he says: "About eleven years ago I was for some time exploring land in Canada—was much exposed, caught cold, and for some weeks *coughed very hard*. At times I would strain severely—it would start my nose bleeding, and sometimes I would start a little blood from *my mouth and throat*."

Levi C. Phillips swears that in the first week of September, 1878, (note that this is just about the time the policy in suit was delivered—and up to which time we claim that Dwight was obliged by law to inform us of all facts that would affect the risk) he had an interview with Dwight, in company with E. S. French, Superintendent of Agencies of the Washington Life Insurance Company (*fol.* 549), in which French demanded back the policies issued by that company, and tendered back the premiums received (*fol.* 550). French told him that it was on account of misstatements in policy—that he had learned he had had blood-spitting, &c., &c. (*fol.* 550). "*Dwight acknowledged that it was true*, but that he thought it "would not make any difference, as he was perfectly sound then" (*fol.* 550). French told him if he "had answered the questions correctly *the Company never would have issued him a policy*"

(*fol. 551*). Dwight, although he refused to give up the policy, said, "*You are all right, as far as your Company is concerned, but I want to keep the policies*" (*fol. 551*). Dwight asked the witness *to say nothing about it, because, if the Company found it out, it would prevent his getting farther insurances* (*fol. 552*). (Note that the statement in the application to us and the one to the Washington are the same. Compare applications on pages 788, 791.)

We come now to the autopsy of Dwight's body. This sets the seal of verity upon our evidence, and gives assurance of its truth. Fifteen doctors—every one in the plaintiffs' interest except Dr. Swinburne—have certified that "the upper lobe of the right lung, at the apex, contained several small fibrous *nodules*" (the word had been written *cicatrices*, and altered to nodules), "probably *the result of old pulmonary phthisis.*" (See page 6 of Autopsy.) This autopsy also showed *adhesions* of the left lung to the pleura. (See Autopsy, page 6.)

Dr. Swinburne, in his testimony, when speaking of this autopsy, says: "In the upper lobe of the right lung was found *what was unquestionably a cicatrix*, perhaps three-fourths of an inch in diameter. By cicatrix I mean scar. Underneath, and in the upper portion of the lungs, was what I term nodules. I see they have been very emphatically called lumps. They were nodules, as you will often find, as the results of old-standing tubercular lungs. The left lung was tied down by adhesions." (*Fols. 777, 778.*)

(Dr. Swinburne swears that the words of the autopsy have been changed since he signed it by passing the pen through cicatrices and writing nod-

ules above it (*fols.* 847, 848); but we will not burden the case with discussing the alleged alteration.)

Dr. Wood says "hard, fibrous nodules indicate "previous ulceration and destruction of the tissue "of the lungs—they are usually of the same character as cicatrices or scars on the external body "—it is a scar on the lungs, and indicates a past "destruction of the tissue." (*Fol.* 891.)

Dr. Lee swears that in his opinion the cicatrices, or nodules, in Dwight's lung were the results of old tuberculous deposit, and that in his judgment the spitting of blood proceeded from these old ulcerations. (*Fol.* 1141.)

Of the fifteen doctors who signed the autopsy, certifying to the nodules on Dwight's lungs, and that they indicated old pulmonary phthisis, three of them have been produced by the plaintiffs—Orton, Burr, and Richards—and they do not dissent from their statements therein.

Let us stop here to recapitulate the appellant's evidence on this question of blood-spitting. Three witnesses have sworn to the actual fact of seeing large amounts of blood spat, accompanied with a severe cough. Seven witnesses have sworn to declarations of Dwight that he had had severe hemorrhages from his lungs; and three of them have stated that Dwight said that he feared he would lose his life thereby. We have shown, also, Dwight's written admission, made in September, 1878, that in 1867 he did have bleeding either from the nose, throat, or mouth, accompanied with a "very hard cough;" and also, by the post-mortem examination of Dwight's body, the existence of scars or nodules, marking old pulmonary phthisis and also pleuretic adhesions.

In addition to this positive evidence, we have also the fact of the non-production of Mrs. Dwight—one of the plaintiffs in the case—who could speak with knowledge as to the fact whether Dwight's sickness in 1867 was accompanied by hemorrhages or not. Our evidence had shown that it was. Mrs. Dwight attended her husband in that sickness (*fols.* 288, 293), and was present at the trial. We have a right to say that her not going upon the stand and contradicting our testimony is not only a "cogent" but a conclusive proof of its truth. She is one of the plaintiffs in this case. *Her absence is voluntary*; and if it was in her power to disprove what had been alleged against her claim, it is fair to presume that she would have done so. The presumption against her is stronger than in the case of a non-production of a witness who is not a party to the action.

We might also allude here to the plaintiffs' not calling Dr. Doane, who attended Dwight in that sickness of 1867. Dr. Doane was present in the court-room, and was not called. Perhaps we are precluded by the law from using any presumptions against the plaintiff from that fact; but we recall here to the attention of the Court what we have said before (page 60, ante)—that Dr. Doane would not probably have been a useful witness to the plaintiffs' case.

Against this array of positive proof, and this presumption of its truth, by the not calling of Mrs. Dwight as a witness, what have we as rebutting evidence on the part of the plaintiffs? Only this—the negative evidence of a few witnesses produced, who swore that they *had not ever seen Dwight spit blood*. They probably told the truth. They were picked up at different places where Dwight had been, or had resided.

Not one is produced who, *like Mrs. Dwight, had been with him continuously for the last twelve years.* She is omitted, and some few people selected who could swear as they did—*having never even seen or heard of the bleeding that Dwight confessed to in his letter to the United States Insurance Company in September, 1878.* (Exhibit No. 50, fol. 2480.) The whole nation of China could have been produced, and would have sworn to the same facts. *What is such testimony worth?*

The defendants also call Drs. Hyde and Chittenden, who had signed the autopsy, certifying to the nodules, and to their indicating old pulmonary phthisis. Dr. Hyde now testifies that in his opinion they do not indicate such old disease. Dr. Chittenden is uncertain. (*Fols. 1752, 1753.*) But see what an exhibition Dr. Hyde made upon his cross-examination. (*Fols. 1594 to 1622.*)

Above we have given the whole testimony in the case upon this point, on both sides.

Having thus given a summary of the facts detailed in the evidence, let us now see what is the law applicable thereto.

What is the disease of blood-spitting that was inquired for in this application?

We shall not claim that the mere *fact* of having spat blood on one or more occasions, which came from the *accident* of a bleeding tooth or a bumped nose, shall be regarded as the disease of blood-spitting which Dwight was obliged to make known in his application for insurance. We shall, however, insist that such serious bleedings, coupled with severe cough, as were sworn to by Forsman and Herdic, *which they saw—bleedings*

which Dwight confessed to as hemorrhages from his lungs to Secomb, Forsman, Herdic and his wife, Bartles, Taylor, Spackman, and which were verified by the autopsy (see ante)—were not such blood-spittings as could be concealed by Dwight or suppressed by him in making application for insurance.

Bliss, in his work on insurance, when speaking of this question, says: "Another usual warranty "as to a specific disease relates to spitting blood"—a question undoubtedly put to extract information indicative of disease of the lungs. With reference to this, it is held that if the inquiry is "whether the insured has ever spit blood, *it is his duty so to state, though he may not believe it came from the lungs.* It is not for him to judge of the origin, but he should inform the company of the fact, and let them make such further inquiry of himself or others as they think proper." (Bliss on Insurance, Sec. 114.)

In an English case (Geach vs. Ingall, 14 M. & W., 95) cited by Bliss, at Sec. 114, the insured had answered the question as to blood-spitting as Dwight did here. "The defendant proved that about four years before the policy was effected the assured had spit blood, and exhibited other symptoms usual in consumptive subjects. The Judge, in summing up, read over the several issues to the jury, and in the course of it stated to them that it was for them to say whether at the time of his making the statement the assured *had had* such a spitting of blood and such affection of the lungs and inflammatory cough as would have a tendency to shorten life. *But this was held to be a misdirection,* for that, although the mere fact of the assured having spit blood would not vitiate the policy, *the assured*

"was bound to have stated that fact to the insurance companies, in order that they might make inquiry whether it was the result of the disease called spitting of blood."

In rendering the decision, Pollock, C. B., says: "By the expression 'spitting of blood' is no doubt meant the disease so called, whether proceeding from the lungs, the stomach, or any other part of the body. One single act of spitting blood would have put the insurers on inquiry as to the cause of it, and ought therefore to be stated."

Baron Alderson, in the same case, adds: "If a person has an habitual spitting of blood, although he cannot fix the *particular part of his frame* whence it proceeds, still, as this shows a weakness of some organ which contains blood, he ought to communicate the fact to the insurance company; for no one can doubt that it would most materially assist them in deciding whether they would execute the policy, and good faith ought to be kept with them."

Again (and it would seem almost as though Baron Alderson had this case of Dwight in view): "Suppose this man had an inflammation of the lungs which had been cured by bleeding. Many physicians would perhaps say that it was an inflammation of the lungs of so mitigated a nature as could not tend to shorten life. Still, that would be no answer to the case of the defendants; for it is clear that the Company intended that the fact should be mentioned."

(The autopsy of Dwight—to which we have alluded—*met exactly the supposed case* put by Baron Alderson. *The cicatrices or nodules on Dwight's lungs* (we care not what they are called) *showed the marks of an old inflammation which had been probably subdued by a hemorrhage.*"

Baron Rolfe, in the same case, says: "I have no doubt that if a man had spit blood from his lungs, no matter in how small a quantity, or even had spit blood *from an ulcerated sore throat*, he would be bound to state it. The fact should be made known to the office, in order that the medical adviser might make inquiry into its cause."

Bliss, in Sec. 115, quotes from two cases decided in Massachusetts bearing upon the same question, in which the Court hold substantially the same views above set forth—one of the cases holding "that if the insured was subject to occasional spitting of blood, accompanied by a cough, he was bound to have stated that fact."

Applying the above rule, so clearly enunciated in the authorities cited—a rule so eminently fair and just, and which the dictates of common honesty teach every man to observe in dealings with another—how is it possible to believe that Dwight spoke honestly in his answer in the application? *He answers unqualifiedly No*, when he is asked if he had had the disease of blood-spitting.

Let us now see if the Judge's charge has placed either the law or the evidence fairly before the jury.

The first mistake that the Judge makes is in assuming that the lungs, the bronchi, the trachea, and larynx, are the only respiratory organs. (*Fol.* 2084.) The respiratory organs include the mouth and nose. The larynx and trachea are only continuances of the aperture of the nose and mouth, through which the air is inspired and expelled to and from the lungs. He was wrong, therefore, in charging the jury that if they find that the blood-spitting we had proved did not come from the or-

gans of respiration as he had *defined them*, then the question put in the application was not untruly answered. (*Fols.* 2086.)

This part of the charge was intended to destroy the effect of Freeman's evidence as to Dwight's admission in 1878 of coughing causing his nose to bleed—of the blood running down his throat, and being hawked up. (See evidence of Freeman, *fols.* 530 et seq.)

The second error that the Judge has made in this part of his charge is that if the blood did come from the organs of respiration as he had defined them—even if it came from the lungs—that the jury might pass upon the question whether it was from a temporary or a serious cause—instructing them that if in their judgment the cause was a temporary one, then that Dwight's denial in the application of the fact that he had spit blood was not an untruth. (*Fols.* 2086, 2007.) Such a principle is not founded either upon law or common honesty. The charge as made is very much like the one at nisi prius, in the case of Geach vs. Ingall's, 14 M. and W., 95, above quoted. There the Judge had left it to the jury to say if the blood-spitting and cough proved in that case would have a tendency to shorten life. The Court, on appeal, as we have seen, held it to be a misdirection, and repudiated the doctrine in toto, holding that the assured—*because it was inquired for*—was bound to have stated the fact, so that the insurer *might have made inquiry*.

The words "temporary cause" used by the Judge are too elastic. They apply, also, to too important organs. We claim that in so vital an organ as the lungs, that if blood is spat from them *from any cause*—be it a temporary or even a curative one, as in the illustration put by Baron Ald-

erson in the case cited *of an inflammation of the lungs which had been cured by bleeding*—that, as Baron Alderson held in that case, the fact must be made known to the insurer.

But the charge in this respect is wrong for another reason. It has left the *materiality* of the blood-spitting, *even though it came from the lungs*, to the jury's decision. If it was immaterial by the test of its being from a temporary cause, then the jury were authorized to say that Dwight did not untruly answer. This is at war at once with the question which we have discussed on pages 40 and 41—that the jury have no business with the question of materiality of the misrepresentation—if the misrepresentation was *either fraudulent*—or if the misrepresentation was made as to a fact *specifically inquired for*. The Court, without charging in the very words, has yet in effect held properly that the representations of Dwight in the policy in suit were warranties (see folios 2209, 2210). The literal truth of the answer was therefore imperatively demanded—and when he was asked to charge, as at folio 2211, that “if Walton “Dwight had spitting of blood from the lungs “or other respiratory organs prior to August 22d, “1878, plaintiff cannot recover,” it was his duty to have done so. The same principle shows the plain errors in the refusal, at folios 2111, 2212, 2113, 2214.

But notwithstanding the great mistakes the Judge has fallen into in not applying the principles of law we are contending for, either in granting the non-suit asked for (*fol.* 2043), or to a direction to the jury to return a verdict for the defendants—let us take the charge as it was given and see if in the discussion of the evidence

the Judge has fairly and fully applied it to the law as he had laid it down. We might accept it as to the latter in its very words, and if any regard is paid to the unrefuted evidence in the case the jury was bound to give a verdict for the defendant.

The Judge, while briefly alluding to the evidence of the defendant, has entirely omitted to refer to some of the most prominent portions of it.

He does not refer to Phillips's testimony, wherein he swears that Dwight admitted his misrepresentations as to blood-spitting, and begged him to say nothing about it, as it would prevent him from getting farther insurances. (*Fols.* 551, 552.)

The Judge fails entirely to mention Dwight's letter of September 11th, 1878, to the United States Life Insurance Company (Exhibit 50, page 827), wherein Dwight admits that in 1867 he "caught cold in Canada," and "for some weeks coughed very hard"—"that at times he would strain severely, and would start a little blood from mouth and throat, and would start his nose bleeding." This letter was written by Dwight to the Company on their demand of return of policy on account of Dwight's misrepresentation as to blood-spitting, and wherein Dwight might be expected to make as favorable a statement as he could.

He fails, also, entirely to notice the notes of the autopsy, and then, at the end of his charge, strikes them out as affirmative testimony—to which there was an exception by the defendant. (*Fols.* 2168, 2169.)

These notes were introduced by the plaintiff *or Court* on cross-examination of Dr. Swinburne (see case folio 826, also folio 818). They were used

on the trial as they appear in the printed case as evidence, *without any limitation*.

They were used on examination of witnesses—not only for contradiction but as the basis of other proved facts, without objection from either side. It was assumed all through the trial that they were in evidence and were to be used as evidence of the true appearance of Walton Dwight's body internally and externally, as determined at the autopsy.

This port-mortem examination was not held in the defendant's interest. It cannot therefore be claimed that the defendant prepared this paper for use on the trial. Dr. Orton—Dwight's medical adviser—the plaintiffs' friend and witness, instituted the autopsy (*fol.* 1820). Only one of the defendants' witnesses was present thereat—John Swinburne.

This paper thus introduced on the trial and used without restriction as evidence, as it had been, the defendant's counsel called upon the Court to charge the jury therefrom that "all the physicians agreed at the autopsy that the fibrous nodules were probably the result of old pulmonary phthisis" (*fol.* 2168). Then *for the first time* and at the close of the charge (*fol.* 2168), does the Court, to the surprise of the defendant, announce that it could not be used as affirmative testimony—this too after having been introduced by the plaintiffs.

We claim that it was too late to take such a position then, especially with a paper which had been prepared in the plaintiffs' interests and introduced by them.

Of the doctors who held that examination the plaintiffs have produced five—Orton, Hyde, Richards, Burr, and Chittenden. All of them have

been questioned in reference thereto, and all have admitted that they had signed these notes without dissent at the time they were signed. (*Fols.* 1821, 1876, 1700, 1702.) We shall claim, therefore, if we cannot use this paper as the admitted declaration of the whole fifteen doctors who executed it, that it shall at least speak for those who signed it and have been sworn as witnesses, and admitted their signatures thereto.

It will be noticed that the Court took a very different course with reference to this paper from what it did with the petition and schedules in bankruptcy introduced by the defendant. Those papers, introduced for a single purpose, were used by the Court as evidence of any fact contained therein. (See *fols.* 2173, 2174.)

We shall claim, therefore, that these autopsy notes shall be regarded as the written statement of the six doctors called as witnesses in the case, except so far as they dissent from or add to the same when testifying.

We therefore say that the Court should have referred to them in its charge to the jury, and stated to the jury that in the opinion of plaintiffs' physician witnesses, at the time of the autopsy, the nodules were evidence of old pulmonary phthisis—and that there were old adhesions of lung to pleura.

None of the six doctors sworn in the case have dissented from the statements in the paper except Dr. Hyde. We have already alluded to his dissent. (*Ante*, page 59.) Chittenden, while not dissenting, expresses himself on the stand as uncertain whether the nodules were evidence of old pulmonary phthisis. Orton, Burr and Richards do not dissent from their statement in the instru-

ment when their attention is called to it on cross-examination. (*Fols.* 1700, 1702, 1876.) Swinburne goes beyond even its statement, and says that the so called nodules were unquestionably cicatrices, the marks of old tubercles.

It will be noted, too, in this connection that all six of these doctors swear expressly to the existence of these nodules or cicatrices, as Swinburne calls them, on Dwight's lung—*not one denies them*.

The Judge also incorrectly says that "neither "Swinburne—nor Orton—nor Burr were called "to speak what the nodules indicated" (*fol.* 2103). How could the Judge say this in the face of the evidence of Dr. Swinburne, which we have heretofore quoted—and of the fact that neither Orton nor Burr when sworn recall what they had said in the notes of the autopsy? (See also folio 1700, 1702).

The Judge also told the jury that "*three* physicians say that in their opinion they do not "necessarily indicate pulmonary disease, and Drs. "Orton and Chittenden say that in their opinion, "looking at these nodules as they saw them, they "did not indicate a previous destruction of tissues at that point or pulmonary phthisis" (*fol.* 2104). *We deny this in toto*. Only *one* physician, *instead of three*, said as above (Dr. Hyde) and Dr. and Drs. Orton and Chittenden *did not say* what is ascribed to them.

And if they had said so, why did not the Judge, in connection with this alleged testimony, *at the moment when he was referring to it*, call the attention of the jury to the notes of the autopsy which they had signed, *whercin they stated exactly the reverse*. He at any rate holds that it can be used as contradictory testimony (*fol.* 2169).

The Judge, too, in referring to Forsman's testimony about the spitting the half pint of blood, does it thus :

"Well, if he meant to swear to that, it ought to *go to his credibility*, because a half pint of blood "raised from the organs of respiration *would leave* "a man, I think—but it is for you to say—in a "very critical condition." (*Fol.* 2109.)

Were these proper words to be spoken to a jury?

The Judge next refers to the entirely negative character of the plaintiffs' testimony, and gives it undue prominence. He leaves the jury to infer that because the plaintiffs' witnesses had not seen Dwight spit blood—knew him as a strong, robust man—"of great vigor, with a large chest and "strong voice"—that therefore the evidence of the defendant's witnesses must be untrue. He did not warn the jury against the *utter unreliability* of such testimony. It is not pretended that a single one of these witnesses saw Dwight in his sick-room in 1867—or *saw him even when he was sick*. The Judge did not tell the jury this.

The Judge, also, as we have seen (ante, page 59), not only robbed the defendant of the presumption which the law gave them therein, that Mrs. Dwight *could not contradict* the evidence of hemorrhages at the sickness in 1867, but in effect has told the jury that *she knew the untruth* of the defendant's testimony as to hemorrhages, and under the guise of "a caution to the jury" not to give "too much weight" to a presumption—has given to the jury the full benefit of Mrs. Dwight's contradiction, without a privilege to the defendant to cross-examine.

The Judge, in giving this strange charge, prefaces it by saying "It is said" (*fol.* 2112), &c. We

should like to know *by whom—where—and under what circumstances*,—we should like to see the authority that relieves *a party to a suit* from a presumption that she could not contradict positive testimony if she fails to take the stand as a witness, and contents herself with the weakest kind of negative testimony instead.

There is no exception noted in the case to this part of the charge. It needed none. A verdict improperly influenced by a misdirection of the Judge will be set aside on motion, upon a case made, although no exception has been taken. (Benedict vs. Johnson, 2 Lansing's Rep., 94; Gourlee vs. Linberger, N. Y. Weekly Dig., 1884, page 429.)

In our testimony about the hemorrhages of Dwight as proceeding from the lungs, we were *obliged* to rely on his declarations. We were stopped by the plaintiffs from examining Dr. Doane, Dwight's attending physician. (See ante, page 59, *fol.* 2111.) Our witnesses of the fact of blood-spitting, of course, could not know if the blood came from the lungs. We were obliged, therefore, to resort to Dwight's declarations of the fact.

It will not do, as the Court has done, to belittle the force of this testimony by calling them "the most dangerous species of evidence." (*Fol.* 2179.) They were not casual, *idle declarations*, made in *casual conversation*, but they were the mournful confessions of a sick man—some of them made at the time of his sickness—to persons interested in his getting well, and who would be therefore likely to remember them. Others were made to a party who had suffered like himself, with the same disease (Secomb), and who had a son afflict-

ed with the same sickness, and who from a morbid desire, so common with sick people, to talk with others who have, or have had, the same disease as their own, had a long conversation with Dwight about the latter's hemorrhages.

We might allude to other matters in this charge of which we might complain. But we desist. Unfavorably to the defendant as the question was submitted to the jury, still the overwhelming evidence in the case—*throwing out of view even the autopsy*—showed conclusively that Dwight in 1867, if not at other times, had had most serious hemorrhages from his lungs—"serious" in the sense charged by the Court—and the jury, even under that charge, should have rendered a verdict for the defendant.

It is impossible to say, under the proofs we have given of actual blood-spitting by Dwight—his confessions of same—his apprehensions of a fatal result at his sickness in 1867, confirmed by Mrs. Dwight's non-contradiction thereof on the witness stand—that Dwight answered truly when he denied the disease of blood-spitting.

The question in the application about blood-spitting contained also another inquiry—whether the applicant had had any disease "*of any other important organ*" than those particularly named. Dwight's answer denied it. Swinburne's undisputed testimony was that the *left lung was tied down to pleura by adhesions* (fol. 777, 778). The autopsy states the same fact (page 6 of autopsy notes—Dr. Burr, plaintiffs' witness admits it (fol. 1698). The fact is entirely uncontradicted. The adhesion showed a disease—inflammation of either lung or pleura—which Dwight had denied. The Court does not notice it—does not form a question for the jury to answer upon it. By

their general verdict for the plaintiff the jury must be regarded as finding against this contradicted fact.

We therefore ask that the verdict of the jury be set aside, as against evidence.

VI.

The statements of the application were made warranties by the policy and must therefore be literally true.

In the application for policy in suit, after all the questions had been put and answered, Dwight made and signed the following declaration: "It is hereby declared that the above are fair and true answers to the foregoing questions, and it is acknowledged and agreed by the undersigned that the above statements shall form the basis of the contract for insurance, and also that any *untrue or fraudulent answers*, any suppression of facts in regard to the party's health—will render the policy null and void," &c., &c.

The policy in suit contains this condition:

"This policy is issued and the same is accepted by the said assured upon the following express conditions and agreements—that the same shall be null, void and of no effect; and that this Company shall not be liable for the payment of of the sum assured or any part thereof," &c.

1st. "If the representations made in the application for this policy *upon the faith of which* the contract is made shall be found in any respect *untrue*."

Bliss on Insurance, Sec. 34, thus defines a warranty: "A warranty is a stipulation forming a part of the contract as it has been completed, and is construed as a condition precedent which must be strictly *complied with to the minutest detail*, or else the contract is rendered void. No particular form of words is necessary to constitute a warranty, as for instance the word "warranty" or "warranted" need not be used. Words of affirmation, affirming matter of fact *upon the faith of which* the party contracts, are as competent to make a warranty as any technical terms."

See also May on Insurance, Sec. 156.

It cannot and will not be questioned in the case that the quotations we have made above from applications and policy make Dwight's statements in the application warranties of their truth.

Being such, the statements must be literally true.

"A warranty must be strictly complied with. It makes no difference whether it is as to a *material or a trivial* fact. A misstatement in a warranty is therefore fatal to the contract, although arising from the *most innocent mistake*, or from *false information afforded by others*, or from *mere inadvertence*—and as much so as if made with the most fraudulent intention."

Bliss on Insurance, Sec. 37.

"The only question is, Has the warranty been kept? There is no room for construction—no latitude—no equity. If the warranty be a statement of facts, it must be literally true."

May on Insurance, page 161.

Bliss, in section 32, above quoted, says: "Lord Mansfield says that in a warranty 'nothing tantamount will do, or answer the purpose. It must be strictly performed.' Mr. Justice Buller says: 'It is a matter of indifference whether the thing warranted be or be not material, but it must be literally complied with.' Mr. Justice Ashurst says: 'The very meaning of a warranty is to preclude all question whether it has been substantially complied with—it must be literally true.' And Lord St. Leonard says: 'It is simply sufficient, and ought to be sufficient, to avoid the policy, that any one thing warranted is not true.'"

The correctness of the legal principles above stated will not be questioned. The court below did not question them. (See Charge, *fol.* 2209, 2210.)

Applying the above principles to the case at bar,

Dwight warranted that for ten years prior to August 22d, 1878, he had been a "real estate and grain dealer." The evidence shows that for *three years* of that time (from 1874 to 1877) his *sole* business was that of a hotel keeper—that he had never been a real estate dealer; and for six years prior to 1874 had had no business. His warranty was therefore absolutely false. (See ante, page 37, et seq.)

Dwight also warranted that he had *never* been engaged in or connected with the sale of any wine, beer, or other intoxicating liquor. The proof shows that from 1874 to 1877 he had sold the same as a regular business, at his hotel. His warranty, therefore, was absolutely false. (See ante, page 42, et seq.)

Dwight warranted at the time of his application that he was insured in the New York Mutual Life Insurance Company, \$10,000—in the Connecticut Mutual Life Insurance Company, \$15,000—in the Washington Life Insurance Company, \$10,000—which was absolutely false. (See ante-pages 47, et seq.)

Dwight warranted at the date of his application, and at the date of delivery to him of policy in suit, that he had not applied to any other company for an insurance which had not led thereto. This warranty was absolutely false. (See ante-pages 51, et seq.)

Dwight warranted that he had never been affected with any serious illness. This warranty was absolutely false. (See ante-pages 57, et seq.)

Dwight warranted that he did not have any medical attendant—which warranty was absolutely false. (See ante-pages 62, et seq.)

Dwight warranted that he had never had the disease of blood-spitting—which warranty was absolutely false. (See ante-pages 64, et seq.)

VII.

Walton Dwight died by suicide.

A. Dwight, as we have seen under Point IV, *designed* in obtaining the policy in question ultimately to cheat the appellant, either by a suicide or a pretended death. We could not designate in which one of the two ways the design would be accomplished. He probably did not determine at the inception of the intent how it should be done. We find now that he did not choose substitution. He has died. The death is in accord with the design to cheat.

B. Dwight did not die of malarial fever, with congestive chills, or from any natural cause.

We have alluded before to the scene at Dwight's death bed and its immediate sequel (ante-pages 29, 30); to the evidences of *strange preparation*, not for an expected natural death—but *for an unnatural one*. We have spoken of Dwight arranging with Hull to be alone with him that night, giving as a reason that Hull "*would be cool and unexcited if anything should happen*"—to the quick death after Dwight's alleged "*gaspnig for breath*" (fol. 1242), and calling "Charlie"—*with not a single mark or symptom of a chill*—(neither he nor the doctor expected one that night, fol. 588)—to Mrs. Owen finding him dead within five minutes after Mrs. Dwight was called. We have spoken of the quick appearance of the nimble undertaker *before the doctor*—to the hurried preparation of the dead body for the grave—to the woeless wife who, disturbed from her sleep at 11½ o'clock by her husband's dying and death, *hurries off to bed again by midnight*. We can speak also of the quick coming of Vredenburgh, a beneficiary under the will (fol. 182), to view the corpse. He was there before the undertaker (fol. 1177), although living quite as far away. He seems to have had a *designated work* to do that night (fol. 1186). Was it simply to prepare himself as a witness of Dwight's death, for which he was afterwards called? (fol. 147.) Vredenburgh and the undertaker can be almost seen watching that night wearily for the word of Dwight's death—and each springing to fill the part assigned to them.

Such a death—with its marks of *previous preparations* for all its details—both *before and after*! Do they look like helping Dwight to *live*—or on the contrary to *die and be buried*?

We claim that the facts to which we have alluded above—evidenced by the plaintiffs' own witnesses—do not point to a death from malarial fever or congestive chills—or from any natural causes.

We have alluded heretofore to Dwight's sickness for some six weeks as a *pretense* (see ante, pages 25 et seq.), claiming that it was impossible for a man to have congestive chills with no fever—no increased pulse—no sweating. His body after death has fixed the lie upon that alleged sickness of six weeks' duration. It showed, in the language of the uncontradicted testimony, "a very 'healthy body.'" (*Fols.* 768, .) The amount of fat was large—"on the neck there was half to 'three-quarters of an inch of hard, firm fat, not 'soft tissue, as you would meet in sickness.'" (*Fol.* 769.) "The muscles were dark red, and exceedingly healthy, just as those of one who died 'in perfect health.'" (*Fol.* 769.) The heart was healthy in every respect, and of normal weight. (*Fol.* 778.) The stomach contained a quantity of undigested food. "The intestines contained an 'appreciable quantity of fecal matter, indicating 'that food had been taken—it was the residuum 'after taking out the nourishment the body needed.'" (*Fol.* 781.) This gave the lie to Dwight's pretense to Dr. Porter that he could keep nothing on his stomach, and had no appetite. The liver was "normal, natural, and healthy," although congested—the spleen was healthy (*fol.* 780)—the kidneys were perfectly healthy, but congested (*fol.* 781)—the brain was healthy, and not congested (*fol.* 773)—the lungs were healthy, except being congested and showing the scar or nodule of an old ulceration. They showed, however, great congestions—engorgement with blood (*fols.*

774, 1851, 1852)—rupture of the air-vessels of the lungs (*fol.* 775) (emphysema), and also serous fluid—the watery element of the blood (œdema) pervading the tissues (*fol.* 777, 778, 1851, 1701, 1702). The blood was exceedingly fluid everywhere (*fol.* 774, 791).

The congested state of the lungs—kidneys—liver, and clots in the brain—with entire absence of pigmentation, discoloration always found in malarial fevers with congestive chills—we shall see hereafter to be the results of a mechanical cause—a strangulation.

See, also, notes of autopsy, upon which Orton and Burr, the plaintiffs witnesses, have been particularly examined as to each statement contained therein, and to which all five of the plaintiffs' experts (Orton, Burr, Richards, Chittenden, and Hyde) subscribed their names, as they say, without dissent (*fol.* 1594, 1821, 1876, 1659, 1754); and do not dissent from them now, except Hyde as to the nodules not denoting phthisis, and Chittenden being uncertain on same subject. (See ante, page 59.) These notes speak particularly of the "fluid blood" of the corpse (page 2), "of thick layers of subcutaneous adipose tissue, "muscles well developed, good color" (page 5)—upper and lower lobes of left lung "congested and "œdematous—upper and lower lobes of right "lung congested and œdematous" (pages 6, 7). Drs. Orton, Burr and Chittenden—all of them plaintiffs' witnesses—confirm in their testimony this congestive œdematous condition of the lungs.

Dr. Swinburne gives his opinion quickly and unqualifiedly that it was not a *natural death* (*fol.* 788).

Dr. Wood is asked this question: "Assume "that a man who has enjoyed previous robust

"health has been sick for five weeks, has had
 "some headaches which have been called congest-
 "ive chills, which have lasted one half hour each,
 "and have not been followed by any fever or
 "sweating stage; that during the sickness the
 "man has had no departure from natural temper-
 "ature; that upon a certain day he eats his din-
 "ner, goes out to the sitting-room, attends to
 "some business, has a bath, passes under the
 "hands of the barber, is left in good condition at
 "about 9.30 P. M., is found dead at 11 o'clock, and
 "at the subsequent autopsy the body shows no
 "signs of violence, and the structural changes are
 "liquidity of the blood, evidences of congestion of
 "the lungs, with emphysema and oedema, the
 "liver and spleen being healthy,—could such a
 "man, in your opinion, have died of congestive
 "chills, or any other form of malarial poison?"

Dr. Wood answers: "That man has not died
 "with malarial poison" (*fol.* 896, 897).

The doctor then goes on and states his reasons—"My opinion is based on the length of
 "the alleged chills—or rather the short-
 "ness of the alleged chills—the absence of
 "the disturbance of the colorification, as to the
 "temperature of the body, the suddenness of the
 "death, the fact that after death not one of the
 "characteristics, pathological changes, or lesions,
 "of intermittent malarial fever are found in the
 "body, and the presence of organic changes in the
 "body which intermittent malarial fever is not
 "capable of producing" (*fol.* 898).

Dr. Wood, at folio 959, says that in cases of
 death from malarial fever of four or five weeks'
 duration, "the color of the spleen would be very
 "dark—perhaps I can best describe it by the
 "word slaty—the color of the liver is usually

“described as bronze color—it is a mixture of the
 “blackish and slate color; from the pigment that
 “is deposited and the natural reddish brown color
 “of the liver.” “This pigment” Dr. Wood describes
 “as the peculiar black granular matter
 “which is found in the blood and tissues in malarial
 “fever, and is the result of the breaking
 “down or disintegration of the red corpuscles of
 “the blood” (*fol.* 960, 961).

Dr. Bridges swears that it would be impossible for a patient to die of malarial fever accompanied with congestive chills of the duration of five weeks, without his internal organs giving evidence of it—the liver would be bronzed and dark colored, and so also the spleen and generally the brain (*fol.* 1030).

It will be noted in this connection that the evidence of witnesses, as well as of the autopsy notes, speak of the “healthy color” of the tissues of the liver and spleen—in fact of all the vital organs. Dr. Chittenden, plaintiffs’ witness, says that the liver and spleen were healthy in color (*fol.* 1766). Dr. Swinburne also (*fol.* 780, 781). There is not in the case one particle of testimony showing any pigmentation of any organ.

Dr. Porter is recalled by the defendant and the following question put to him :

“Assuming that a man forty-one years of age,
 “who had previously enjoyed robust health, had
 “been complaining for about three weeks, and
 “was found on a Saturday morning in bed shivering,
 “teeth chattering, surface clammy and cold,
 “with the blood settled under his nails, and so
 “continued from one to two hours, breaking out
 “into a cold sweat, with a feeble, whispering
 “voice, and that this attack passes off without a

"fever; that the second Friday after this occurrence, having during the day been attending to business with his lawyer, having his beard dressed by a barber, he was left at 10 P. M. by his doctor in such a condition as to create no alarm; that at or about 11 P. M. he spoke pleasantly to his attendant, calling the attention of his attendant to his manner of eating a cracker, helping himself to one from a dish near his bed, and chewing it without difficulty; that within fifteen minutes the attention of the attendant was called to such a man by a gasping noise; that this man was dead within a few minutes thereafter; that at the autopsy held within fifty-eight hours after the death the liver and spleen were found to be normal, except congested, the heart nearly empty, and that there was no pigmentation anywhere,—could such a man have died of congestive chill, or any other form of malarial fever?"

The doctor answers: "In my opinion, he could not have died of congestive chill, or any other form of malarial fever." (*Fols.* 1950 to 1953.)

Dr. Wood is recalled, and on the same question being put to him answers, "He could not." (*Fols.* 1867 to 1970.)

Another question put to Dr. Wood, involving the same facts, also the congestions before spoken of, and other physical structural changes, which had been proved, and were also evidenced in the autopsy (to which we shall allude hereafter), was, "Could, or could not, the death have been produced by natural causes?" He says "No." (*Fols.* 1970 to 1975.)

Dr. Sherman is recalled, and asked the same question, as to the possibility of death from malarial fever, and he answers it was impossible for

the man to have died of that disease. (*Fols.* 1898.) He answers, also, the same question as last asked Dr. Wood, and says "it could not have been a natural death. (*Fol.* 2002.)

Dr. Swinburne is recalled, and answers the questions in the same way—that the man could not have died from malarial fever, or from a natural death. (*Fols.* 2009 to 2016.)

Dr. Bridges, recalled, answers to the same questions in like manner. (*Fols.* 2022 to 2029.)

Dr. Avery, recalled, answers the same questions in the same way. (*Fols.* 2035 to 2041.)

Dr. Hyde, the plaintiffs' witness, says that there was nothing in the body that indicated to him the cause of death (*fol.* 1593). He admits signing the autopsy without dissent (*fol.* 1594), wherein occurs the expression "thick layer of "subcutaneous adipose tissue—muscles well de-veloped, good color," &c. (*fol.* 1637).

Dr. Burr, plaintiffs' witness, swears that he signed the autopsy and confirms the facts expressed therein. He is examined as to every statement in the autopsy which he affirms. The autopsy therefore can be used against this witness to show its well nourished body and the normal condition of every vital organ except the congestions—which we have before referred to—and shall again to show therein the marks of strangulation (*fols.* 1676 to 1710).

Dr. Burr is not asked if he could tell the cause of Dwight's death.

Dr. Chittenden for plaintiff swore that the heart was healthy (*fol.* 1763)—lungs also, except congested and unduly inflated—liver healthy—spleen healthy and normal, only a little softer than it should be—nothing unusual—stomach

contained food—intestines fecal matter (*fol.* 1766, 1767). This witness swears that he did not see enough structural changes in the body to cause death (*fol.* 1770).

Dr Orton for plaintiff, who was one of the doctors who attended the autopsy, admits his signing the same, and that the stomach contained food and the intestines fecal matter (*fol.* 1852). Also that all of the organs of the body were healthy (*fol.* 1857), except congestion of kidneys, liver and lung.

This witness by itemized questions confirms every statement of autopsy (*fol.* 1849 to 1863).

Dr. Richards for plaintiff admits that he signed the notes of autopsy without protest or objection (*fol.* 1876).

The foregoing includes all the evidence given on both sides as to the question whether Dwight died a natural death, from any disease—and particularly from congestive chills or malarial fever.

Five doctors—some of them among the most distinguished in the land—have sworn that it was impossible, from the appearance of the internal organs, that Dwight could have died from malarial fever, or from natural causes.

Of the five doctors called by the plaintiffs, not one contradicts *a single reason or scientific fact* given by the defendant's witnesses as the basis of their opinions that it was impossible for Dwight to have died a natural death, and particularly from malarial fever or congestive chills; and not a single one has dared to answer that he could see in Dwight's body *any cause for a natural death*.

The scientific or expert testimony is therefore all one way. The very fact that the plaintiffs

have not dared to contradict the defendant's witnesses in the testimony they have given upon these scientific questions must be taken as conclusive that *they could not do it* with success.

The Court in its charge to the jury, however, has told them that "Dwight had had severe *chills and that in one of these chills he died.*" "They produce in support of the theory the per-
sons who were about his death bed" (*fol. 2125*).

This is said by the Court *with not a single fact proved to support the statement, and had not been even claimed by the plaintiffs' counsel.*

The statement of the Court is at once challenged. We quote :

"Mr. Russell—Do the plaintiffs claim he died "of that chill? I heard no such claim in this "case and the counsel said yesterdsy there was "no question of malarial chill in this case."

"The Court—He said no question of malarial "chill."

"Mr. Larocque—I do not know that they say "that there is any cause of death."

"Mr. Gladding—The witnesses say that he had "the same symptoms as he had before." (This is simply untrue. Hull is the only witness who is sworn as to the death struggle, and *he gives not a single symptom of a chill.*)

"The Court—That is a question for you, but I "understand that was the claim from the evi-
dence that he died from a chill. The witnesses "who were present at the time of the death and "immediately preceding the time of death at-
tempt to describe the condition of Dwight, and "it is for you to say if it becomes material "whether he died from a chill or from some other "cause—some other natural cause."

Charles Hull, as we have said before, is the only witness the plaintiffs have called as to that strange death scene—Mrs. Dwight and Spaulding the *only two other witnesses*, the Court *has excused and defended their absence* to the jury (*fol.* 2113, 2114). There is not a line or word in the whole of Hull's testimony *that can be even tortured into proof of the fact that Dwight had a chill that night*. On the contrary the proof in the case—the only proof, is that Dwight expected no chill (*fol.* 589). Dr. Burr evidently expected none (*fol.* 588), his wife expected none and went to bed at 10 o'clock and to sleep.

But the court below would probably say because *Mrs. Dwight sent Lee for some hot water*, that therefore Dwight must have had a chill. The plaintiffs' counsel, as we have seen above in the colloquy between Attorney-General Russell and the Court, did not have the audacity to claim it. *Dwight when that hot water was sent for was already dead*. Mrs. Owen was the first person in the room after Mrs. Dwight and Spaulding. She was there before Lee. She says Spaulding tried to give Dwight brandy *that he did not swallow* (*fol.* 594); then Mrs. Dwight suggested "We must do something else;" and sent for hot water. No effect was observed after putting his hands in water (*fol.* 595); and Mrs. Owen adds: "*He never spoke or moved, or gave any sign of life, after that time*" (*fol.* 595.)

The Court should not have compelled us to waste time to refute its assertion that Dwight died in a chill, and we leave it now without another word, save this—that it is the *third* time in the charge to this jury that facts have been used in favor of the plaintiffs which had not been proved. (See ante, pages 38, 39, 80.)

We might allude here to a little discrepancy between Mrs. Owen's testimony and Lee's as to the time of Dwight's last breath. Mrs. Owen's testimony went to show that the death had occurred either before or at the time of Spaulding's trying to administer the brandy that Dwight did not swallow, or the use of the hot water by Mrs. Dwight. Lee thinks that Dwight showed some signs of life after that. He speaks of his breathing at the rate of "*four or five times a minute*" after his hands were put into hot water. Mrs. Owen, who was constantly in the room, watching Dwight—and being his sister-in-law—is more probably correct. Lee was in and out of the room, in getting water and other things, and was not such an interested spectator as Mrs. Owen—and besides, his account of the respirations is incredible. The discrepancy, however, is not material on the point we have been discussing—that there is no proof whatever that Dwight died in a chill, or had had one about the time he died.

Have we not now shown that this alleged sickness of Dwight's from malarial fever and congestive chills was a lying pretense—intended only to prepare for a death carrying out his original design to cheat the appellant, and the other insurance companies?

A six weeks sickness with the "dreadful chills" that Dwight spoke to Dr. Porter about should have shown its effects on Dwight's body after death. We find there *no emaciation—no softness of tissues—no signs of disease—no changes in the appearance of organs—no lesions—no pigmentation* that the alleged disease always effects. Every one of the defendant's witnesses alludes to the damning absence of these signs and marks; and they are

not criticised or contradicted in the slightest manner by the plaintiffs' experts.

Dwight's pretense, too, that he had no appetite—of his inability to keep food upon his stomach—we have shown to be false by the appearance of his "well nourished" body, with its "half to three-quarters of an inch of firm, healthy fat upon his neck"—by his stomach, with its undigested food, and his intestines containing fecal matter.

The plaintiffs' doctors—every one of them—when asked whether they can say from Dwight's body what was the cause of his death, simply answer, "*Ignoramus*"—We are ignorant.

From the *presumptions* that we have before alluded to, which perforce spring into the mind from the deathbed, and the acts immediately following—from the *positive testimony* of our scientific experts that Dwight did not die, and could not have died, from malarial fever or congestive chills, or *from any natural cause*—from the confessed inability of the plaintiffs' experts to deny the existence of the facts on which our experts have based their opinion, or to refute the correctness of the latter's opinions,—we claim that Walton Dwight did not die as the consequence of his pretended sickness from malarial fever or congestive chills—and did not die from any natural causes whatever.

C. Dwight's death was suicidal and by strangulation.

A man has been found dead on the sands of the sea shore, at *low water mark*. A coroner's inquest is held. A witness is produced, and swears that he was with the man when he died—that he died where he was found, *at a certain day and*

hour, which he gives with great particularity—that he died a natural death—or at least without violence self-inflicted, or inflicted by the witness.

Eight astronomers—well known and experienced in the science of astronomy and mathematics, from constant study and practice—two of them having written learned books upon the subject, which have been accepted as text-books—swear that at the time which the witness named when he saw this dead man die, the tide was *at its full flood*. They swear to this as a *scientific fact*, and then, on *that fact*, give an opinion that the man could not have died a natural death at the place indicated. These eight gentlemen, for the purpose of comparing their mathematical calculations, or for the purpose of bringing out fully and clearly the scientific fact that they are about to testify to, have a meeting and consultation together. They draw up, or assist in the drawing up, of certain questions to be propounded to them.

Five other astronomers are sworn at the inquest who do not in any way deny or contradict the scientific fact that there was a high tide at the time and place indicated, or the accuracy of the calculations. Three of them swear that they see no cause for the death of the dead man.

The coroner, in charging the jury, bids them beware of the testimony of these eight astronomers, because they were not present at the death, and, besides, they are contradicted by the witness, who swore that he had actually seen the man die on the sands. He tells the jury “these eight gentlemen have consulted in advance of the inquest. They have framed questions—consulted “with each other.” He says—“Gentlemen, it is “not the province of this coroner’s court to erect “a standard by which to govern or gauge the con-

“duct of members of another profession; but I do
 “say that when a witness testifies to his mere opin-
 “ion formed in this way, and under such condi-
 “tions, you have the right to regard it, and you
 “should regard it, with great suspicion. But,
 “gentlemen, what I say in this respect is not to
 “control you.” (*Fol.* 2154.)

Under this charge of the coroner, the jury, after forty-eight hours' confinement—under the duress of that confinement, and sickness of some of their number—seeing no prospects of release, consent to a verdict that the man did die a natural death, at the place indicated, although it was *a positive, proved scientific fact in the case* that if he did so die, there must have been (putting the place for the illustration in the Bay of Fundy), fifty feet of water above his body.

The proceedings on the inquest, we will imagine, come before this Court for review. With what patience would the charge of the coroner and the verdict be treated? Would this Court affirm the coroner's erroneous view of the value of the scientific testimony *given as facts* in the case, or would it uphold him in the gratuitous insult thrown upon gentlemen who were at least his peers in society or in the professional and scientific world? Would this Court sustain the verdict on the testimony of the single witness against the positive testimony of the ~~five~~^{eight} scientists, *uncontradicted and unexplained*, that the man's natural death, at the time and place indicated, *was an impossibility*? Would not the Court regard that single witness as a perjurer? Nay, would it not regard him as privy in some way to the death of the dead man as an accomplice?

The supposed case meets the one under consideration, and the Court will find even more diffi-

culty to support the charge of the Court below and the finding of the jury in the case at bar than in the one which we have given for illustration. In the latter there was only a *single* scientific fact adduced by the astronomers to show the impossibility of a natural death; Dwight's dead body showed a dozen or more—*utterly conclusive—shutting out all doubts*, or possibilities of doubt, that he died by asphyxia caused by strangulation.

The human body is a machine, set in motion by that mysterious force—life. If it stops, like in any other machine, it is due to some cause. Old age—disease—violence,—all are active causes. Science for centuries has been learning by slow but constant study pathology—the symptoms and effects—of such causes. She has written down what she accepts after the strictest inquiry, examination, and thought.

The medical gentlemen that have been called by the defendant—Drs. Wood, Flint, Swinburne, Porter, Sherman, Bridges, Avery, Lee—have come to tell, on the witness stand, what is thus recognized by science as the *necessary concomitants* of asphyxia by strangulation—of the changes of the structural mechanism of the human body *it always produces, and must of necessity produce*—changes just as certain as is any geometrical truth—as certain as that at a given hour the waters of the sea must show either the flow of an ebb or of a flood tide. These facts thus given by these gentlemen are *facts*, and not opinions. They are facts which the scientific world have agreed upon as true in the same sense as any axiom or law is taken as true in any other science than that of pathology.

Now what are these changes in the human mechanism that always show themselves in a death caused by strangulation from the constriction of the neck by a rope?

Our scientific evidence marks them thus: Engorgement of the lungs with dark, unoxygenized blood—Emphysema of the lungs, or the bursting of the small air-vessels therein—Oedematous lungs (that is, lung tissue containing the serous, watery matter of the blood)—Bloody mucus in the bronchia of lungs, and in the throat below the constriction—Fluid blood, loaded with carbon—Ecchymosis (little spots of effusion of black blood on the surface of the skin, on the back and on arms and shoulders)—Pallor of the face—Clot on the brain, and effusion of blood in its membranes—Congested kidneys—Congested liver—Congested stomach—Congested intestines—and, lastly—The mark of the rope, or similar instrument, around the neck, by which the constriction was effected, but which mark is not necessarily present, as the others. The mark, and its distinctness, will depend upon the amount of force used to produce the strangulation. If much more than is necessary is used, the mark will show itself by a groove in the neck. If no more than sufficient to stop the respiration, and impede the circulation to, and stop the circulation from, the head, it may not be noticed at all.

Science knows of no disease or mechanical cause that can account for all these structural changes from a normal state in the human body except the constriction of the neck by a cord or similar instrument, continued until death is produced. One, or even more, might be the effect of other causes. The presence of all can only be reconciled by a death from strangulation in the man-

ner indicated. The evidence of Drs. Wood, Swinburne, Porter, Flint, Sherman, Bridges, Lee, Avery says so, and it is not even attempted to be controverted.

Dr. Swinburne, a witness for the defendants—of very large experience in his profession—who was present at the autopsy, has alluded to the presence of all these signs of strangulation in Dwight's body. The notes of autopsy also plainly proclaim them. All five of the medical experts produced by the plaintiffs swear that they signed these notes without dissent (*fol.* 1594, 1821, 1876, 1700, 1702), and Orton and Burr have by specific questions on cross-examination repeated what they had said in these autopsy notes. Let us now refer to the testimony for the proof of the existence of each one of the signs of strangulation which we have before enumerated in this dead body of Dwight's.

Engorgement of the lungs with blood. Swinburne (*fol.* 774, 775). Orton (*fol.* 1851, 1857). Burr (*fol.* 1701, 1702). Notes of autopsy (pages 6, 7). Chittenden (*fol.* 1745).

Emphysema of lungs. Swinburne (*fol.* 775). Autopsy (pages 6, 7). Chittenden (*fol.* 1764). Orton (*fol.* 1851).

Bloody mucus in the bronchial tubes and trachea. Swinburne (*fol.* 776). Notes of autopsy (pages 6, 7, 11). Orton (*fol.* 1851). Burr (*fol.* 1702, 1709).

Fluid blood, loaded with carbon. Swinburne (*fol.* 786, 781, 773). Notes of autopsy (page 2).

Ecchymosis. Swinburne (*fol.* 768). Notes of autopsy (page 2). Orton (*fol.* 1849). Burr (*fol.* 1691).

Pallor of face. Swinburne (*fol.* 769).

Clot on the brain and effusion of blood in its membranes. Swinburne (*fol.* 772, 773). Notes of autopsy (pages 3, 4). Burr (*fol.* 1694).

Congested kidneys. Swinburne (*fol.* 781). Notes of autopsy (page 11). Burr (*fol.* 1707, 1708). Orton (*fol.* 1857).

Congested liver. Swinburne (*fol.* 780). Notes of autopsy (page 11). Orton (*fol.* 1857). Burr (*fol.* 1707).

Congested stomach. Swinburne (*fol.* 780). Autopsy notes (page 9). Burr (*fol.* 1705). Orton (*fol.* 1853).

Congestion of the intestines. Autopsy notes (pages 9, 10). Burr (*fol.* 1706, 1707).

Mark of rope. Swinburne (*fol.* 770, 771). Sherman (*fol.* 969). Freeman (*fol.* 1017). Bridges (*fol.* 1022). Notes of autopsy (page 1).

We might add to the above citations as proving the mark on the neck of Dwight's corpse, the name of each one of the plaintiffs' medical experts—(Orton, Burr, Hyde, Chittenden, Richards)—but do not do so at this point for the reason that while *they admit the mark*, they question whether it was made by a rope or any instrument of constriction. We shall quote what they say hereafter.

Above is the evidence of the existence of the structural changes—marks that science has told us unmistakably point to the fact of strangulation by a constricting cord around the neck. We have taken the proof indiscriminately from the testimony of defendant's and plaintiffs' witnesses.

And here let us also observe that the notes of the autopsy, which we claim shall be regarded as evidence in the case (see ante, pages 77, 78), to

which we have so often referred, were not prepared by defendant, nor was the post-mortem examination held in its interest. It was instituted by Dr. Orton, the plaintiffs' witness and friend. (*Fols.* 1820, 1821, 1822.) The defendant had only one representative thereat—Dr. Swinburne.

Besides proving in Dwight's dead body these incontrovertible marks and signs of strangulation, the defendant has also shown the mechanism of their production—*how* the constricting instrument produced the structural changes in the body described in the evidence. Dr. Flint is called for the purpose of showing this—connecting the cause with the effect. He shows *how and why* they are coexistent, and dependent one upon the other. So that, given the structural changes, the strangulation must have been the necessary antecedent; or, given the death by strangulation, the other signs and marks would necessarily follow.

The way in which emphysema of the lungs is mechanically produced Dr. Flynt describes at folios 1082, 1083, 1089. To this we add another, not proved in the evidence, but a mechanical explanation which, we think, is apparent: The air-vessels of the lungs are filled with air. The air is prevented from escape by a rope around the neck. The lungs, necessarily engorged with blood being forced into them by the heart, and with blood which cannot freely escape to the head and brain, the air in these cells *becomes compressed*. These delicate vessels are unable to withstand the compression, under the heart's continued action. The walls of the cells give way, causing emphysema.

The reason why the blood is not oxygenated, and remains dark colored, is described at folios 1083, 1084, 1089—the reason of the pallor of face

is given at folio 1086—the reason of clot on the brain and congestion of its membranes is given at folios 1087, 1090—the reason of the congestion of kidneys is given at folio 1091—of the stomach, at folio 1092—of the liver, at folios 1092, 1093—the reason of the ecchymotic spots is given at folio 1094—of the congestion of the lungs, at folios 1095, 1096. The œdematous condition of the lungs is due to the heart's powerful action against the obstruction at the neck, forcing the serous, watery element of the blood through the walls of the delicate blood-vessels of the lungs—in the same way that a powerful pump, throwing water through an *obstructed* hose, will either burst the latter or drive the water through its pores.

In short, Dr. Flint tells us that the arterial circulation *to* the brain being partially arrested by the constriction of the neck—and the arterial circulation *to* the face being cut off by the constricting cord—all the arteries *below the cord* become congested by an oversupply of blood. Two-fifths of the circulation of the body naturally goes to the upper extremities. This becomes almost wholly obstructed by the constriction of the neck. The lungs would therefore, of necessity, become engorged; and that, too, with unoxygenized blood—the inspiration of air being stopped. This engorgement of the lungs, with the heart still pumping blood into them—with violent attempts at respiration—bursts the air-vessels—causing emphysema. The distended blood-vessels of the lungs cannot withstand the power of the heart, and the serous or watery element of the blood is forced through their walls, causing œdema. The kidneys, liver, stomach, intestines—in short, all the organs below the cord, by being obliged to re-

ceive more than their share of blood, become distended with blood, and congested. This accounts, also, for the ecchymose spots on shoulders, back, and arms, which are nothing more than ruptured small blood-vessels close to the surface. They appear below the point of constriction, and at a point where the anatomical arrangement for the supply of blood is most marked. (*Fol.* 1094.) They appear something like "black and blue spots," for the reason that, ^{and} being cut off from the lungs the blood becomes loaded with carbon, and dark colored.

The arteries that supply blood to the face being near the surface of the neck, and constricted by the cord, receive no blood. Pallor ensues. The veins leading from the brain are compressed, while the arteries that lead thereto are only partially so, on account of their being more deeply seated in the neck. The heart in action therefore keeps forcing *some* blood into the brain's arteries which cannot get back. A distension and bursting of the delicate blood-vessels of the brain's membranes must occur. Hence the clot on the brain, and the staining of the vesicular covering of the brain, of which all the physicians who have been called as witnesses have spoken.

From what has been said, we can also understand the "swollen tongue" and "engorged temporal veins" of which Swinburne speaks as finding at the autopsy. (*Fols.* 773, 775.)

It requires no anatomical skill to understand what Dr. Flint and our other experts have so vividly portrayed.

Dr. Wood swears that bloody mucus in the bronchial tubes means an indication of death from suffocation. (*Fol.* 889.) Ecchymose spots upon the back and arms indicate, if confined to

that region of the body, death from suffocation. (Fol. 899.) At folio 907 he describes them, and gives the reason why they are found on the upper extremities. An empty heart, in connection with the congested condition of the lungs and other organs, indicates that the patient died from some form of suffocation, and had a very powerful heart, which continued very late in its action (fol. 900). Bursting of the air cells in the lungs (emphysema) indicates very violent efforts at respiration, when the respiration has been impeded (fol. 900). Intensity of engorgement of the lungs, connected with clot on the brain, indicates that death was from suffocation, by something which has obstructed the circulation in the neck (fol. 900)—that lesions of the lung substance, in asphyxia from natural causes, are *simply congestion*; but from causes unnatural (that is, not due to diseases of the body) they are *congestion joined to emphysema and œdema*. These are the common lesions of asphyxia. Under some circumstances one or more may be absent (Fol. 905). In strangulation there is intense congestion of the stomach, which has been found to affect the pyloric end of the stomach, and has been described as resembling the results produced by the injection of irritants. (Fol. 942).

The limited time afforded for the printing of this brief will not permit us to quote the remarks of standard authorities upon the structural changes and lesions caused by strangulation; we therefore are obliged simply to give references to the Court to authorities below.

Authorities on emphysematous, hyperæmic, œdematous and congested condition of lungs:

Casper, vol. 2, New Sydenham edition, pages 126, 185, 187.

Tidy, vol. 3, Wood's Library, 1884, page 283.
 Ogston, Philadelphia edition, 1878, page 529.
 Guy & Ferrier, London edition, 1875, page 293.
 Beck's Medical Jurisprudence, 5th edition, vol. 2, pages 111 and 112.

Authorities on congested kidneys :

Casper, vol. 2 (New Sydenham Society edition), pages 130, 206, 208, 220, 226.

Taylor's Manual of Medical Jurisprudence, London edition, 1874, page 370.

Ogston, Philadelphia edition, Lindsay & Blackiston, 1878, page 529.

Tidy, vol. 3, Wood's Library, 1874, page 284.

Authorities on capillary ecchymosis-spots :

Taylor's Manual of Medical Jurisprudence, London edition, 1874, page 369.

Ogston, Philadelphia edition, 1874, page 538.

Casper, vol. 2, New Sydenham edition, page 187.

Tidy, vol. 3, Woods Library, 1884, page 282.

Dean's Principles of Medical Jurisprudence, ecchymosis patch about upper part of body, page 443.

Authorities on empty heart :

Tidy, vol. 3, Wood's Library, 1884, page 283.

Right side of heart empty, page 112.

[NOTE.—Dr. Swinburne proves the empty heart of Dwight's corpse, *fol.* 774.]

Authorities on the bloody mucus in bronchia and trachea :

Tidy, vol. 3, Wood's Library, 1884, page 283.

Taylor's Manual of Medical Jurisprudence, London edition, 1874, page 370.

Ogston, Philadelphia edition, 1878, page 528.

Casper, vol. 2, New Sydenham Society edition, page 129.

The importance of investigating as to this condition is now a regulation in Prussia. Casper, vol. 2, page 129.

Authorities on dark fluid blood :

Guy & Ferrier, London edition, 1875, page 294.

Casper, vol. 2, New Sydenham Society edition, pages 125, 126. (There is no exception to this rule.)

Tidy, vol. 3, Wood's Library, 1884, page 283.

Taylor's Manual of Medical Jurisprudence, London edition, page 370.

Authorities on hyperæmia, or stained condition of pia-mater, and of clot on the brain :

Dr. John Swinburne. Case, page 264, folio 790.

Taylor's Manual of Medical Jurisprudence, London edition, 1874, page 370.

Casper, vol. 2, New Sydenham Society edition, page 130.

Tidy, vol. 3, Wood's Library, 1884, page 283.

Dr. Austin Flint. Case, page 363, folio 1087.

Dean's Principles of Medical Jurisprudence.

Vascularity of brain and membranes, page 443.

Mucous froth, sometimes bloody, in trachea and bronchia, page 443.

Authorities on condition of stomach and bowels :

Taylor's Manual of Medical Jurisprudence, London edition, 1874, page 370.

Casper, vol. 2, New Sydenham Society edition, page 130.

Ogston, Philadelphia edition, 1878, page 529.

Dean's Principles of Medical Jurisprudence—stomach congested—page 444.

We have purposely avoided until now the discussion of the question whether there were any signs or marks on the neck of the instrument used for strangulation.

We claim now to have shown in Dwight's body the existence of certain lesions and conditions that *compel*—not simply lead to a presumption—but *compel and drive to the acceptance of the hypothesis* that he died by strangulation. The internal organs of his body speak as certainly of the fact that it was strangled to death as did the sun and moon in reference to the tide that we have before used as an illustration. If we do not find the mark of the constricting cord, it will not, it can not, disturb our hypothesis—it cannot sever the necessary connection between effects and cause. If we find the external marks on the body which harmonize with the internal conditions, it is well. It will be, however, only cumulative evidence of a fact already fully proved. It will be no more. If we do not find it, it will be of no moment, and it will not be the first case of a man hanging himself without leaving a mark on his neck. (*Fols.* 932, 947.)

Dr. Porter, on alluding to this on a sharp cross-examination by plaintiffs' counsel, aided by the Court, says: "It would not change my views if "the furrow on the neck had been made after "death. I can't see how, under the circumstances "mentioned—I do not know of any disease that "would have caused these post-mortem conditions "within the cavity of the chest and thorax." (*Fols.* 1958, 1959.)

Dr. Wood also swears that the mark on the neck is not a necessity in cases of death from strangulation (*fol.* 932).

Dr. Chittenden, the plaintiffs' witness, says the same thing (*fol.* 1784).

Starting with the probabilities of their being a mark on the dead man's neck, showing the track of the strangulating tool, let us now examine the evidence upon this point.

The autopsy was held on the 18th day of November, Dwight having died near midnight of the 15th of the same month. Dr. Swinburne attended it as one of the examining physicians.

Dr. Swinburne, when speaking of the corpse, says: "There was a heavy indentation in the neck, commencing on the right side, at the upper part of the windpipe—the part which is indicated by what we know as the *os hyoides*—that is, the hyoid bone—and extending upwards and backwards to within perhaps an inch or so, and perhaps less, of the centre of the posterior part of the neck. On the left side the same indentation commenced about the upper part of the cricoid cartilage. It is the lower end of what is known as Adam's-apple. The other is the upper end of it. That extended about the same angle upwards and backwards until within perhaps an inch and a half of the other that I described as on the other side. The indentations faded out as they went back a little—that is, a little less posteriorly than on the swelled side of the neck. That angle, as near as I can remember, was from 40 to 45 degrees upwards and backwards from the first point indicated. The indentations were, I will say, perhaps *full three-eighths of an inch deep*—so that you could lay your finger right in them; and about that *in width*—I should say full that. At the bottom of the indentation there was a peculiar appearance, a sort of *leathery* appearance—looked *half burned*, or had a *scorched appearance*; the indentation was a *rounded furrow*—*there was no fold of the skin*; in depth, I think, it was about three-

eighths of an inch—it may have exceeded that a little.” (*Fols.* 770 to 772.)

The autopsy notes refer to this same mark thus: “Dr. Swinburne notes a *heavy indentation* “extending upwards and backwards from os hyoides to right around back of neck and on left side below the thyroid cartilage running upwards and backwards at an angle of about 45 degrees.”

(It will be remembered that all five of the plaintiffs’ experts signed these notes without dissent, *fol.* 1594, 1821, 1876, 1700, 1702, 1611.)

Dr. Sherman swears that he was at the coroner’s inquest on Dwight’s body in April, 1879—that he saw this deep furrow on both sides of the neck, and extending upwards from the larynx at an angle of 45 degrees. He called attention of his colleagues and of the coroner and coroner’s jury to it, *putting his finger in it as he did so* (*fol.* 969). The doctor says that the skin within this furrow had a “leathery feel,” what Casper calls “mummified,” and other authors, “parchment like” (*fol.* 973). This doctor had seen other cases of strangulation by rope, and he says the appearance of the furrow in Dwight’s neck was similar to those. The doctor describes the appearance of “the furrows” he had seen in other cases, and answers distinctly that this one could not have been produced without force. (*Fol.* 977). The doctor also introduced a view of the bedstead whereon Dwight died. (Exhibits 84 and 85, following page 858.) He says the scroll-work on top of the head-board of bedstead was made of two-inch stuff, and top of head-board was four feet above bed (*fol.* 980).

Dr. Bridges also swears to his being present at the inquest, and noticed this furrow upon both sides of the neck, and describes it substantially as

above. He says this furrow *was rounded at the bottom* about an eighth to about a quarter of an inch deep, and a quarter to a half an inch broad (*fol. 1022*); the lower or bottom part of the furrow *was rounded* so it filled the *convex surface of my little finger that I passed through on each side*. The base of the groove was hard, and had a parchment look. (*Fol. 1023.*)

Nathaniel B. Freeman swears that he was also at this inquest. He found on the neck a furrow or indentation on both sides into which he put his finger, the index finger of his right hand (*fol. 1017*). The feeling at bottom of furrow was hard; its appearance was similar to old leather (*fol. 1017*); it was darker than the skin around it (*fol. 1018*).

Albert D. Hitchcock swore that he attended the inquest as a reporter of a newspaper (*fol. 1153*), and saw the "mark and groove and discoloration of the neck" (*fol. 1155*). He describes its angle and appearance as the other witnesses. He says the color of the groove was darker than the skin around it (*fol. 1157*). This witness describes a case he saw of a man who had committed suicide by hanging, resting on his knees and toes (*fol. 1158*), with a groove on his neck similar to this (*fol. 1159*).

Against this array of positive testimony that at the autopsy and inquest this "furrow" in Dwight's neck was visible, it cannot be denied. *It is an undisputed fact in the case.*

It is claimed, however, by the plaintiffs that this furrow in the neck was not caused by a rope at the time of death, but was occasioned by bending forward the head of the dead man by resting it on a book and pillows when he was "laid out" for his coffin. Three of the plaintiffs' ex-

perts—Orton, Hyde, and Chittenden—thus try to explain the furrow, as does also the industrious Ayers. None of the witnesses, however, deny the fact that the groove or furrow was on each side of the neck, starting *from each side* of the Adam's-apple, and extending upward at an angle of 45 degrees, and not meeting at the back of the neck.

Let us look at this theory a moment, and see how utterly ridiculous these experts and Ayers have made themselves. It is admitted that there was no groove or furrow *in front* of the larynx or windpipe. All hands agree that it started from each side of the Adam's-apple, about an inch apart (see Orton, *fol.* 1838), and ran upward and backwards at an angle of 45 degrees, coming within two inches of meeting, as Swinburne says, at the posterior part of the neck; and, as Orton says, *within two or three inches.* (*Fol.* 1838.) Dr. Chittenden describes the lines of the groove about the same. (*Fols.* 1742, 1785.) The theory is that bending the head of the corpse forward by placing the head on a book and two pillows (*fol.* 1204) made the groove.

Take any roundish material of the thickness and shape of a man's neck—say six inches in diameter. Bend it from a straight position to a curve, as this neck of Dwight's is said to have been. What necessarily, *by the law of mechanics*, ensues? The fibres of the thing bent, on its *upper* and outer circumference, are *stretched and elongated*. The fibres on the *lower* or *under* circumference are *compressed* and *folded* in upon themselves. It is the illustration of the "breaking stress" in mechanics, and upon which an article entitled "Strength of Materials" can be found in Appleton's American Encyclopedia. The *centre* between the upper and lower surfaces of the thing

bent, if it is rectangular or circular, is the *medial line* at which there will be no stretching or compression of fibre. Now take Dwight's neck as he is lying on his back; bend the head forward, with its chin towards the chest, and the tissues of the posterior part of the neck *must stretch* to accommodate themselves to being the outside of the longer line; the tissues of the anterior part of the neck *must compress, and fold, and double up*, in order to accommodate themselves to being the inside or shorter line of the curve. The fold, therefore, of this anterior part of the neck would be *greater immediately over the Adam's-apple*, and in running backward it *would fade away at the medial line or centre of the neck*; and from such medial line going to the posterior part of the neck, the stretching and elongation of tissues during the curving process necessarily *forbade any groove being formed there*. If the neck was, say, six inches in diameter, that would make it about nineteen inches in circumference. The centre, or medial line, would therefore be nine and a half inches from either the posterior or anterior part of the neck. The end of the grooves, therefore, at the back of the neck, must be *nine and a half inches* apart. The grooves on Dwight's neck came within two or three inches of meeting. The law of mechanics shows the utter and pitiful silliness of this theory, and we shall waste no more words upon it. The cross-examination of these three experts showed, also, before they left the witness stand, that they began to comprehend their mistake. Dr. Wood, also, puts the theory at rest by swearing that during the trial he had experimented on two cadavers, treating them according to the theory advanced by the plaintiffs' experts, and that it was impos-

sible to produce the furrows thus. (*Fol.* 1977, 1989, et seq.) Dr. Sherman also swore to the impossibility (*fol.* 2003).

The grooves on Dwight's neck were indisputably there at the time of the autopsy, and the plaintiffs' theory of accounting for them is, as we have seen, untenable.

These grooves, as the uncontradicted evidence says, *were rounded at the bottom*, starting from each side of the cartilaginous Adam's-apple and running *upward and backward* at an angle of 45 degrees, and meeting at the back of the head, within two or three inches. The *form* of the grooves—the *angle* at which they run backward and upward—their *distance apart* at the back of the neck (the loop of the strained cord suspended from the head-board of bedstead not permitting it to touch the neck at that point)—*all point with certainty to the use of a rope*. But, besides this, five of our witnesses (Swinburn, Bridges, Sherman, Hitchcock, Freeman) describe with great minuteness the discoloration, and the "leathery, "parchment-like feel" of the grooves. This discoloration and feel, however, is attempted to be controverted by four of the plaintiffs' witnesses (Orton, Hyde, Chittenden, Burr).

Before examining the plaintiffs' evidence in rebuttal as to these grooves or furrows, let us stop a moment and recapitulate the testimony, so as to bring it into contrast with what the plaintiffs claim in reply.

1st. We have shown Dwight's design to commit suicide. (Point IV.)

2d. We have shown by the preceding pages that *his death must have occurred* by strangulation *from a cord or similar instrument* constricting the neck.

3d. We have shown furrows or grooves on Dwight's neck after death *which answer exactly* to what would be produced by Dwight hanging himself from the head-board of his deathbed with a rope.

4th. We have shown that the plaintiffs' theory for the production of these grooves or furrows is entirely untenable, and must be cast out of the case.

Against this formidable array of facts which drive the mind to conviction that these furrows on Dwight's neck *must have been* produced by a cord, the rebuttal evidence should be of so convincing a kind as perforce to *drag the mind away* from the conclusion it was forming. Let us now examine that evidence.

Dr. Orton says that he was present at the autopsy, and that he observed no parchment feel in the furrow, or discoloration. (*Fol.* 1815.) At the coroner's inquest, although present, "he paid no attention to it, and did not look at it." (*Fol.* 1835.) This man is not only pecuniarily interested in the plaintiffs' success (*fol.* 1828), but he is in a measure also professionally. He examined Dwight on all of the applications for insurance, and is in a sense privy to his frauds. He is also *disingenuous*. See his cross-examination, and his denials of ever having talked with counsel or parties as to his testimony. (*Fols.* 1831, 1832.)

Dr. Hyde is next called by the plaintiffs, and swears at first that "*he saw nothing*" on Dwight's neck—"no indentation or groove across or around it." (*Fol.* 1585). He finally says there was "a wrinkle" (*fol.* 1588)—that it was not different in color from the other skin. He does not claim to have felt it, and his age—seventy-three years—may have dimmed his sight. The manner of this

witness on the stand—his unwillingness to answer questions—his equivocations (*fol. 1594 to 1622*)—should discredit his testimony.

Dr. Chittenden is next called by the plaintiffs, and claims that there was no discoloration in the groove, or unnatural feel. This witness admits the possibility of a man's hanging himself in bed (*fol. 1779*), and also *that a man may hang himself by the neck and leave no mark* (*fol. 1784*).

Dr. Burr is next called by the plaintiffs. He says that he did not *see* anything having the appearance of parchment (*fol. 1675*). He admits that *he did not feel of it* (*fol. 1685*).

Dr. Richards, for plaintiffs, admits that although present at the autopsy, and held the inquest thereafter, he was not near enough to the body to feel of these indentations or describe them (*fol. 1873*).

Above is all the evidence produced by the plaintiffs to rebut the discoloration and the leathery or parchment-like feel of the admitted "heavy indentation" that Swinburne and the autopsy notes describe as existing on Dwight's neck at the first post-mortem examination, and which remained there so distinctly at the coroner's inquest five months thereafter.

It will be noticed that it is *entirely negative*—and cannot therefore be received as a refutation of what Swinburne, Bridges, Sherman, Hitchcock and Freeman had affirmatively and positively sworn to as to the discoloration and leathery feel of this mark on the neck, which has been called indifferently in the testimony as "heavy indentation"—"furrow"—"crease." More than all, it cannot weigh a feather's weight against the absolute certainties which are forced upon the

mind by Dwight's *design* to commit suicide—by *his doing it* by strangulation with some constricting instrument and *the furrow on the neck*, which would be likely to be “discolored” and “leathery,” as our witnesses described.

The plaintiffs' rebuttal testimony in this regard has been feeble and inconclusive. It is compulsory, therefore, to accept the statements of our witnesses that the bottom of the furrow was *leathery to the feel and was discolored*.

The plaintiffs have tried to prove another fact in rebuttal—that the furrow in the neck was not on Dwight's neck immediately after his death.

They call for that purpose Vredenburg and Ayres, to whom we have alluded before as coming so quickly after Dwight's death, although living a quarter of a mile away, *both reaching the death bed before the doctor*—(pages 88, 30, ante.) We have spoken of that as a *strange fact* in the case, and as denoting that *arrangements for these mens coming* had been made. (page 88, ante) before the death.

Ayers swears that there was no crease or mark of a rope about Dwight's neck, but admits “that he paid no more or special attention to his examination of the neck than he did to any other part of the body” (*fol.* 1217). This man shows himself too ready to swear in the plaintiffs' interests. He denies positively that Dr. Swinburne at the autopsy used the words “heavy indentation” (*fol.* 1234), while the recorded words of the autopsy says that he did (notes of autopsy, page 1). He swears also that Dr. Swinburne at the autopsy said the indentations were probably due to the head being bent forward. Dr. Swinburne swears most distinctly *that he never said so* and that the autopsy notes recorded a lie

against him in that particular *and had been altered since he signed them* (fol. 851, 852, 853, 856 857, 858).

Vredenburg, "the casual and not intimate "friend" (fol. 1182), and yet a beneficiary under Dwight's will (fol. 1182), who came so soon after the death, and without a pretence of his being sent for, also swears that these creases were not there. He says that he examined the neck closely. *Why?* He says at first that "the gas was "turned up" in the room where the corpse was (fol. 1194), afterwards takes it back (fol. 1195), and finally will not swear that there was any gas-light in the bed-room (fol. 1196).

This man appears to swear *under some strange reservations*. (See fol. 1186.) He had been testifying that "his examination of neck was clear "and marked; that examination was not clear "and marked on account of something that had "been sent to me; it was not on account of some "fact of which I had been informed." He is then asked, "Was it on account of something that was "stirring in your mind?" and he answers, "I "hardly know how to answer. If I comprehend "the question; if I may explain that—" Question. "I want a categorical answer." Answer. "*I will say yes, then.*" At another time he is asked the question, "You noticed no change that "night when you were there, and looking at his "(Dwight's) head?" Answer. "*Well, he didn't look exactly—nothing that I remember—nothing "that impressed me.*" (Fol. 1197.) *What does this mean?* This man, "a mere casual friend," is made a beneficiary under Dwight's will—appears at the deathbed *before even the undertaker or doctor*—professes he made this careful examination of the neck without giving any reason therefor—

in a room that he first says had a gas-light, turned up—then admits he does not know if there was a gas-light at all—shows by his testimony some strange reservations, even leaving the impression that he was not confident that the dead body was Dwight's. *Is he worthy of credence?*

The next witness called is Lee, who helped the undertaker undress the dead body—to wash it and redress it for burial. He swears that he did not see any crease or line around his neck. (*Fol.* 1724.)

The testimony of these three witnesses is also of a negative character. It simply amounts to this—that *they did not see* “the crease or mark” of which they were inquired about. It was in the night when these three men saw the body. Dwight, too, had a short, thick, fleshy neck (*fol.* 1741), and wore a full beard (*fol.* 586). If Ayres and Lee did not look expressly for this mark, it is quite probable that they would not see it. That Vredenburg could satisfactorily examine the neck in a room in which he cannot swear there was a light (*fol.* 1195)—with no pretense that he felt of it with his fingers—with no reason given why he did look for it in the hurried call which he gave the dead man (it will be remembered that he had arrived and was leaving when the quick and nimble undertaker came, *fol.* 1183, 1184)—is not credible. In regard to this testimony, we repeat what we have said before—that Dwight's proved *design to commit suicide*—his actual commission of it *by strangulation*—the existence of a *furrow upon the neck* which has not been accounted for, and cannot be explained by any other theory *than by a rope*,—compel us to *accept the fact as a verity, that the mark was there when Dwight died*. It is unnecessary to claim, even,

that either of the three witnesses swore corruptly. They may have sworn mistakenly, which, under the circumstances, we have shown it was quite possible for them to do.

But why are we spending so much time in proving that the plaintiffs' witnesses were mistaken in their description of the furrow, as they saw it at the autopsy and coroner's inquest, when they said it was not discolored, and was not leathery to the feel? Why take so much time in showing, also, that Lee, Vredenburg and Ayres were mistaken when they say the furrow was not on Dwight's neck the night he killed himself? *It was entirely unnecessary for the defendant to prove the mark on the neck.* The other proved facts—about which there is no contradiction—the abnormal state of the lungs and brain and pia mater—blood—kidneys,—in short, of all of the vital organs,—pointed so incontrovertibly to a death by strangulation from a cord around the neck, that it is entirely unnecessary that the mark of the cord should be proved. *Besides, in many cases of hanging the mark of the cord is entirely lacking.* Dr. Porter has said so (*fol.* 1958)—Dr. Wood has said so (*fol.* 932)—even Dr. Chittenden, the plaintiffs' witness, has been obliged to say that his reading has told him so (*fol.* 1784).

Caspar (the new Sydenham Society edition of 1872), second volume, page 190, refers to a case which, he says, was "well known to be suicidal, "in which a man aged thirty hanged himself, "and died from pulmonary hyperæmia. The "mark of the cord was in this case not visible, "and could not have been expected to be so, inas- "much as the deceased had a remarkably strong "beard, and the cord had laid in this, on the hyoid

"bone." "On shaving off the beard, a superficial mark was found on the right side of the neck, three lines broad, one inch and a half long, and of a faint, dirty color." And Caspar adds, "How easily might such a trifling mark have been overlooked!"—*thus accounting for Lee and Vredenburg and Ayres, not finding it or seeing it under Dwight's beard on the night of his death.*

At page 173 Caspar says: "Indeed, I confess to being convinced, by the results of these experiments, that the mark of the cord is a purely cadaveric phenomenon, whereby, of course, *its diagnostic value is reduced to nil.*"

Tidy says (Ed. 1884, Vol. III, p. 244) "that if the hanging be very brief and the ligature soft and supple, and the body be instantly cut down after death, there may be no mark of the ligature at all."

Again, on same page, Tidy refers to Dr. Allison's paper in the Lancet, where it is claimed "that the mark of the cord has no diagnostic value." Also "that the discoloration does not appear in some cases *until some hours after death.*"

See also Tidy, vol. 3, page 245.

How could the Court then, in view of all this, charge the jury that the furrow in the neck "lies at the very foundation of the defendant's theory of strangulation?" (*fol.* 2141.) That was a plain misdirection.

But the plaintiffs also say, and the Court lays great stress upon the fact in his charge to the jury, that Charles A. Hull saw Dwight die, and that from Hull's testimony the death must have been a natural one (*fol.* 2128, et seq.)

We have alluded before to Charles A. Hull (ante-page 29), and shall spend very few words upon him. He is like the witness of whom we spoke in our illustration (ante-pages 99, 100, 101), who told of the man dying a natural death on the sea shore, with the moon and sun as witnesses against him. He too is the man that Dwight arranged to have with him the night he was to die, "*because he was cool and would not get excited if anything should happen.*" He is the man who dares to stand up in the full view of Dwight's dead body, speaking from its brain—throat—lungs—heart—blood—stomach—kidneys—liver, *proclaiming that it was strangled to death*, and pretend that Dwight died as he has described. Science has interpreted for us the words of these "poor dumb mouths" and put "a tongue into their every wound." It is this Charles A. Hull who stands *alone* under their criminations, *without help from Mrs. Dwight, or from Spaulding* who were with him at Dwight's last struggle, and one of whom (Spaulding) is proved to have "pinched" the *probably protruding tongue* of the dead man (*fol. 1301, 1722*). Charles A. Hull is *the only one* of this ghastly trio that is called as a witness—and *dares to pretend that this was not a suicidal death and that he was not an accomplice and was not privy thereto.* It is not the *opinions* of our expert witnesses (from which the Court below tries so hard to shield Charles A. Hull), *but it is Dwight's dead body that is the witness against him*, and upon which is recorded not only Walton Dwight's guilt *but also his own.*

Thus far we have discussed this question of suicide without alluding to the so called "opinions of expert witnesses," which the court below,

in its charge, seems to have thought were the foundation of the defense. We have used only the body of Dwight, as the record of the suicidal act. *We need no other evidence.* The opinions of our experts were given, based on the entirely uncontradicted scientific facts that Dwight must have died by hanging. They were, however, as unnecessary as the opinions of the eight astronomers in our illustration (ante, pages 99, 100), after they had shown that by reason of the tide being at the flood the man found on the sea-shore could not have died a natural death at the place indicated. The following question was asked Dr. Wood :

Q. I recite to you certain facts which I assume, for the purpose of asking your judgment upon those facts as a medical expert : You examined, about fifty-eight hours after death, in the middle of November, the body of a man found dead at about 11 P. M., having been last seen alive one hour and a half before, and then apparently not in a condition of apprehension of sudden death ; you find it to be the body of an unusually large and powerful man, great muscular vigor, with a considerable development of firm fat, forty-one years of age ; you find nothing unusual in the appearance of the face and the general surface of the skin, except the presence of small dark spots, indicating a little effusion of blood in the skin of the back and the back of the right arm ; a furrow about the sides of the neck, nearly meeting in front and behind, about the size of the little finger, rounded at the bottom, and the skin involved in the furrow dense and hard, and the surface like parchment, the furrow beginning in front just above the larynx, extending upwards and backwards at an angle of forty-five degrees ; the brain

and membrane perfectly natural and healthy, except a clot of blood on the surface on one side of the head, the clot being evidently of very recent origin, but not sufficient to produce death; the lungs deeply congested with dark liquid blood, but presenting no evidence of inflammation; a few small fibrous nodules, and the bronchial tubes and windpipe deeply congested and filled with bloody mucus; the heart and the blood-vessels, including the valves of the heart and the vessels supplying the blood to the substance of the heart, absolutely healthy and natural in size, and in every other regard, excepting a slight unimportant thickening of some of the valves, the cavities containing a very small quantity of dark blood; the liver, spleen and kidneys absolutely natural and healthy, except that they, especially the kidneys, are deeply congested with blood, and of natural size and weight; a small quantity of undigested food in the stomach, the mucous membrane of the stomach and intestines congested, and a small area of apparent inflammation, about the size of a dollar, in the stomach. Finding all the organs in the condition stated, and the furrow made as described above, what, in your opinion, was the immediate cause of death? A. *It is not possible that the man could have died of anything else than strangulation by a cord.*

The same question is asked Dr. Porter, and he answers, Asphyxia, by hanging (page 357).

It is asked Drs. Sherman, Bridges, Avery, Swinburne. All answer, Asphyxia, by hanging (pages 328, 342, 353, 263).

The following question was also asked Dr. Wood:

Q. Suppose that a man, after an obscure alleged illness of about five weeks' duration, is on a given

day able to be up and transact business with his lawyer, and have his beard trimmed; is left by his doctor at ten P. M. on the same day in such a condition as not to give any cause for alarm, and at eleven P. M. is talking pleasantly to his attendant and eating a cracker, and in less than an hour thereafter is dead; and that at the autopsy, made fifty-eight hours after death, the following facts are revealed: a heavy indentation extending upwards and backwards from os hyoides to right around back of neck and on left side below the thyroid cartilage, running upwards and backwards at an angle of about forty-five degrees, post-mortem discoloration of posterior portion of body, several small ecchymoses in skin of back and shoulders; anterior part of right arm, small ecchymosis; thorax, lungs and heart in natural condition, except that the lungs are unduly inflated; about four ounces of serum in bottom of left pleural cavity; the same in right pleural cavity; left lung, one pound and three-quarters; bronchi congested and coated with mucus, upper lobe congested and cedematous, lower lobe still more congested and cedematous; right lung two pounds, bronchi congested and coated with mucus, upper lobe at the apex several small fibrous nodules, rest of upper lobe congested and cedematous, lower lobe congested and cedematous; heart healthy, weight fifteen ounces, right ventricle contains a little fluid blood, not over one-half ounce, left ventricle contains little fluid, not over one-half ounce, left auricle contains a little clotted blood; stomach at the fundus, mucous membrane softened and partly destroyed by post-mortem changes; pyloric end of stomach, mucous membrane studded with small white spots denoting chronic gastritis; liver congested more than usu-

al, normal color and consistence; kidneys uniformly congested, but otherwise healthy; epiglottis, larynx and trachea congested and coated with mucus; inner surface of dura mater on left side chronic hemorrhagic pachy-meningitis, with a small extravasation of blood on the left side, over the posterior portion of the parietal and anterior portion of occipetal lobes; pia mater of convexity normal, except discoloration over occipetal lobes from blood; brain neither congested nor anæmic, otherwise healthy; and further, that on inquest held five months after the first autopsy, the indentation on the neck was still distinctly visible; could or not death have been produced by natural causes? A. No.

Q. Assuming the same conditions as are stated in the last question, state what was the cause of death. A. Mechanical asphyxia, produced by strangulation with a cord, or some similar article.

The same question was also asked Drs. Porter, Sherman, Bridges, Avery, Swinburne. They all answer as did Dr. Wood (see pages 667-673, 675, 680).

We now have seen that science and *the opinions* of our experts are in accord; both pronouncing judgment that Walton Dwight's death was caused by hanging himself.

We have called the Court's attention heretofore *to the absence of any testimony in the case contradicting in any way the evidence of our scientific experts* that the structural changes and lesions in Dwight's body pointed unmistakably to a death by strangulation, and by the use of a constricting cord at the neck. Perhaps it may be urged that the contradiction was *implied* by some of the plain-

tiffs' physician witnesses swearing that "they saw *no cause* of death." Those witnesses surely did not mean by such testimony to be understood that in the congested state of Dwight's lungs, brain, and other vital organs, they did not see a *proximate* cause of death. Their testimony must be taken to mean that they did not see the *ultimate cause*. Charity for them demands this explanation. In other words, they simply meant to say, "We do not see on the neck "what we regard as the mark of the rope"—assuming that such mark was necessary, and that the furrow was caused on the erroneous theory which they explained. As we have before said, this testimony of the plaintiffs' experts is simply writing down "Ignoramus, for "self and fellows," and was not intended as a contradiction of the defendant's scientific evidence.

With a few words—and very few—in reference to the Judge's charge to the jury, we shall close our argument of this point.

We have the same fault to find with it that we have had before, in the submission of other questions. That the Judge was opposed to the defendant's success in the case, it cannot be either indecorous or untruthful to assert. It is plainly to be seen in his charge. This being so, it is not at all strange to find careless, and sometimes unfair, comments upon the evidence. We have pointed them out sharply before (ante, pages 38, 39, 80, 97). At folio 2159 he speaks of Dr. Hyde swearing that "he saw no amount of bloody mucus, or bloody serum, in the thorax; and he testified, and so did Dr. Orton, that he did not observe some of the conditions assumed to exist in "the hypothetical question." Though Dr. Hyde

did swear as the Court said, in regard to the bloody mucus, the Court did not, as *it ought to have done*, call the attention of the jury to Dr. Hyde's statement in the autopsy notes (pages 6, 7, 11), *where he had said just the contrary*. Nor did the Court call the attention of the jury to the fact that Drs. Orton and Burr, the confrere witnesses of Dr. Hyde for the plaintiffs, had expressly contradicted him (*fols.* 1851, 1702. 1709).

Dr. Orton did not, as the Court told the jury, swear that he had not observed some of the conditions assumed to have existed in the hypothetical question, save as to the appearance of the mark around the neck, which we have heretofore fully discussed (see ante, pages 119, 120). On the contrary, Dr. Orton admitted signing the notes of autopsy, and his examination does not contradict them in a single instance.

The entire misapprehension by the Court of the defence—its assumption that it was made up wholly from *opinions* of experts instead of its resting upon *facts which science has accepted as truths*—its denunciation of our scientists,—have been the means of misleading the jury, and inducing a verdict that is not only unjust to the appellant but will produce a shock to the cause of morality. If this verdict stands, and the criminal world sees with what lenity, nay, with what favor, such raids as this made by Walton Dwight upon life insurance companies are regarded by courts and juries, a swarm of pillagers of life insurance companies is sure to be hatched into life. It will be the legitimate result of this verdict.

We might refer to other matters in the charge; for example, to its defense of Hull's credibility—(*fols.* 2156 to 2160)—but we forbear. That question, with others upon the charge as to the ad-

mission and rejection of evidence, will be met in another brief to be furnished by associate counsel who have charge of that branch of the case.

We therefore close here our argument upon the question of Dwight's suicide by asking that the verdict of the jury be set aside, as against evidence.

VIII.

The judgment should be reversed.

We claim that for the reasons given in our foregoing points the judgment should be *absolutely reversed* and the case not sent back for a new trial.

In *Edmonston vs. McLoud*, 16 N. Y. Rep. 543, it was held that when "a verdict must be set aside upon a case, and it is apparent that no possible state of proof applicable to the issues will entitle the plaintiff to a judgment, the appellate court should render final judgment for the defendant and should not award a new trial."

In *Griffin vs. Marquardt*, 18 N. Y. Rep. 28, the Court held that if it is *entirely plain* that the party against whom the reversal is pronounced cannot prevail upon a retrial, there should be an absolute reversal.

See also *Guernsey vs. Muller*, 80 N. Y. Rep. 181. Code, sec. 1317.

How would it be possible in the case at bar for the respondents to show that ^{Dwight} ~~he~~ had answered the questions truly as to his being a "real estate and grain dealer" for ten years prior

to his application for insurance; or of his "never
 "having been engaged or connected with the sale
 "of liquor," in direct contradiction of his sworn
 testimony in the bankruptcy proceedings? How
 could ~~they~~^{Dought} prove the truth of ~~his~~^{his} answer that he
 had not applied for insurances which had not led
 thereto on the 4th day of September, 1878, *when*
every one of his applications but four were prior
thereto, as appears from the date of applications in
the case? How could ~~they~~^{Dought} prove that it was true
 that ~~he~~^{Dought} was insured at the date of his application
 for policy in suit in the New York Mutual Life
 Insurance Company and in the Connecticut Mu-
 tual Life Insurance Company, when in fact he
 had never been insured in either?

J. LAROCQUE,

D. MAGONE,

of Counsel for Appellant.